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No. 81- ——

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES M. NAMEN, et al. and STATE OF MONTANA,

Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Question I.

A. Whether the "strong presumption" that a state is constitutionally vested with title to a navigable lake within its borders is overcome merely because a portion of that lake lies within the exterior boundaries of a treaty-created Indian reservation, when such treaty is substantively indistinguishable from the Fort Laramie Treaty of 1868 construed in *Montana v. United States*, 450 U. S. 544 (1981), and when there exists no unusual public exigency to depart from the Equal Footing Doctrine.

B. Whether alienation of nearly 100 percent of former Indian lands riparian to such navigable lake confirms title to the bed of the lake in the state.

C. Whether treaty, statutory, and judicial imposition of the navigational servitude upon that portion of the navigable lake that lies within the borders of the Indian reservation strengthens the constitutional presumption that title to the bed of the lake vests in the state pursuant to the Equal Footing Doctrine.

Question II.

Whether *Wilson v. Omaha Indian Tribe*, 442 U. S. 653 (1979), requires ownership of riparian land within an Indian reservation to be measured by reference to state law.

Question III.

Whether, in light of *Montana v. United States, supra*, federally created, and non-Indian owned riparian rights of access to a navigable lake within the exterior boundaries

of an Indian reservation are subject to tribal control, absent congressional authorization or proof that exercise of such riparian rights threatens or has some direct effect on the Tribe.

Question IV.

Whether a tribal shoreline protection ordinance approved and supported by the federal government, which comprehensively regulates non-tribal fee owners' federally granted dockage, wharfage, and access rights to a navigable lake, constitutes a denial of equal protection or deprivation of due process of law contrary to the Fifth Amendment to the United States Constitution.

PARTIES TO THIS LITIGATION

Pursuant to Rule 21.1(b), Rules of the Supreme Court of the United States, Petitioners name the parties to the litigation: James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen, and The State of Montana, Petitioners, v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and Thomas E. Pablo, Chairman of the Tribal Council, on his own behalf and as a representative of The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the United States of America, Respondents. An additional party to this litigation in the court below was the City of Polson, Montana.

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Petitioners, James M. Namen, et al. and the State of Montana, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1982, and in which a petition for rehearing and suggestion for rehearing *en banc* were denied and rejected on March 10, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals in *Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, et al. v. James M. Namen, et al., City of Polson, Montana,* and *State of Montana,* 665 F. 2d 951 (9th Cir., 1982), appears as Appendix A. The lower court's order denying Petitioners' application for rehearing and rejecting their suggestion for rehearing *en banc* is included in Appendix A. The unpublished opinion of the United States District Court for the District of Montana, *Confederated Salish & Kootenai Tribes v. James M. Namen, et al.,* appears as Appendix B. Because the Court of Appeals adopted its opinion in *Montana Power Co. v. Rochester,* 127 F. 2d 189 (9th Cir., 1942), on the lake ownership issue, that opinion appears as Appendix C.

The initial phase of the present controversy was commenced in 1973 and produced two opinions. *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont., 1974), aff'd 534 F. 2d 1376 (9th Cir.), cert. den. 429 U. S. 929 (1976) (*"Namen I"*). Copies of those opinions appear as Appendices D and E, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 11, 1982. A timely peti-

tion for rehearing and suggestion for rehearing *en banc* was denied March 10, 1982, and a timely application for an extension of time within which to file this Petition was granted, extending time to July 1, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

TREATIES AND STATUTES INVOLVED

The following treaties and statutes are reproduced as appendices:

1. Treaty of Hellgate, 1855, 12 Stat. 975 (Appendix F);

2. Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (Appendix G);

3. Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Appendix H);

4. The Flathead Allotment Act of April 23, 1904, 33 Stat. 302 (Appendix I);

5. House Report No. 1678, 58th Cong., 2nd Ses. (Appendix J);

6. Senate Report No. 1930, 58th Cong., 2nd Ses., April 7, 1904 (Appendix K);

7. Senate Report No. 117, 61st Cong., 2nd Ses., January 26, 1910 (Appendix L);

8. Regulations for the Sale of the Villa-Site Lots around Flathead Lake in the Former Flathead Indian Reservation, Montana, March 20, 1915 (Appendix M);

9. Ordinance 64-A, Shoreline Protection Ordinance (Appendix N);

10. Stipulation and Order dated November 1, 1974 (Appendix O);

11. Patent issued to Antoine Morais (Appendix P).

Other statutes and constitutional provisions involved are:

1. The Enabling Act of Montana, February 22, 1889, 25 Stat. 676, which in pertinent part provides:

> "An Act * * * to enable the people of * * * Montana * * * to be admitted into the Union on an equal footing with the original states * * *."
>
> "Section 4 * * * Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, * * *."

2. The Fifth Amendment to the United States Constitution, which in pertinent part provides: "No person shall be * * * deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

This case originated in 1973, when the Confederated Salish & Kootenai Tribes of the Flathead Reservation ("the Tribes")[1] sought to force James M. Namen and

[1] "The Flathead Indian Reservation * * * consists of approximately 1,245,000 acres, of which approximately 628,642 acres are owned in fee, 614,311 in trust, either for the Plaintiff tribes (564,320 acres) or individual Indians (49,991 acres), and 1,017 acres by the United States. The reservation is part of four Montana counties—Lake, Saunders, Missoula, and Flathead. * * * Tribal members comprise 19 percent of the total reservation population." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313 (D. Mont., 1975), aff'd 425 U. S. 463 (1976).

others ("Namen") to remove docks, wharves, and other structures which encroached upon the south half of Flathead Lake.[2] The Tribes contended that Article 2 of the Hellgate Treaty, 1855, 12 Stat. 975 (App. F at 208) vested them with absolute beneficial title to the south half of Flathead Lake and that any encroachment upon the bed of that lake, without tribal consent, was a trespass upon tribal property. In *Namen I*,[3] the district court held, following a prior Ninth Circuit decision, *Montana Power Co. v. Rochester*, 127 F. 2d 189 (9th Cir., 1942) (App. C), that while the Tribes owned beneficial title to the south half of Flathead Lake; neverthless, fee owners of land riparian to the lake possessed federal common law riparian rights of access to the lake which included the right to dock and wharf out to navigable water.[4] In *Namen I*, the district court left for later determination the question of whether

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[2]Flathead Lake is the largest body of fresh water west of the Great Lakes. It is 26 miles long and up to five miles wide. Its south half contains 45 miles of shoreline. Mem. Op. at 40, 59, App. B at 86, 110. Approximately 1,400 docks and wharves extend into the south half of the lake. In the past, these docks and wharves have been comprehensively regulated by Lake County under the Shoreline Protection Act, 75-2-201, *et seq.*, M. C. A., 1981, and the Corps of Engineers. Mem. Op. at 39, 65, App. B at 84, 118.

[3]*Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), aff'd 534 F. 2d 1376 (9th Cir.), cert. den. 429 U. S. 929 (1976). Apps. D and E, respectively. This was the first instance in which the Tribes had judicially alleged an exclusive right to the south half of the lake which would exclude riparian rights of dockage and wharfage. App. O at 286.

[4]The level of Flathead Lake is regulated pursuant to Federal Power Commission License No. 5, presently owned by The Montana Power Company. This license requires The Montana Power Company to maintain the level of the lake between 2893.2 and 2883.2 feet. The lake is maintained at high-water mark only 10 weeks of the year. For the remaining period of time, it is maintained below that level. At low water, littoral to Namens' property, a navigable depth (four feet) is reached at 450 feet from high-water mark. Mem. Op. at 41, n. 58, App. B at 87.

any of the Namen structures[5] represented an abuse of these riparian rights. *Namen I*, 380 F. Supp. at 467 (App. D at 201). On appeal, the lower court, in a *per curiam* opinion, affirmed and adopted the district court's opinion. 534 F. 2d 1376. Certiorari was petitioned for by the Tribes but denied. 429 U. S. 929 (1976).

In 1977, the Tribes passed Ordinance 64-A (revised), their Shoreline Protection Ordinance. App. N at 272. The ordinance was passed for the purpose of regulating existing and future riparian structures maintained by nonmembers in the south half of Flathead Lake. The Tribes amended their complaint to allege, *inter alia*, that the Namen structures violated the ordinance and to require the Namens to maintain their structures in compliance with tribal law. Additionally, the Tribes alleged that the existing structures constituted an abuse of common law riparian rights because they were more extensive than needed, were of a type not permitted, affected water quality, and interfered with navigation and Indian fishing rights on Flathead Lake. The United States intervened on behalf of the Tribes, and the City of Polson and the State of Montana intervened on behalf of Namen.[6]

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[5]Later, similar structures erected by the City of Polson, Montana, were also challenged in the Tribes' amended complaint.

[6]Three actions were filed in and consolidated by the district court: Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Plaintiffs and Counterclaim Defendants, and United States, Intervenor-Plaintiff, v. James M. Namen, et al., Defendants, and City of Polson, Montana, Intervenor-Defendant and Counterclaim Plaintiff, being Cause No. 2343; City of Polson, Montana, Plaintiff, and State of Montana, Intervenor-Plaintiff, v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Defendant, being Cause No. CV-75-143-M; and United States, Plaintiff, v. City of Polson and The State of Montana, Defendants, being Cause No. CV-77-70-M. These actions were later consolidated on appeal to the lower court as Cause Nos. 80-3189, 80-3190, 80-3196, 80-3216, and 80-3274.

The district court, in a memorandum opinion (App. B), dismissed those counts of the complaint alleging abuse of federal common law riparian rights[7] and further ruled the Tribes had no authority to regulate the riparian rights of non-Indians who owned land riparian to the south half of Flathead Lake (the "regulatory issue"). However, following its prior ruling in *Namen I, supra,* the court held the south half of the lake was owned by the Tribes (the "ownership issue").

The United States sought a declaration that the Flathead Indian Reservation was not *pro tanto* disestablished because it was opened to non-Indian settlement pursuant to the Act of April 23, 1904, 33 Stat. 302, App. I at 236 (the "termination issue"). The district court held no such disestablishment had been effected.

The Tribes and the United States appealed from the district court's ruling on the regulatory issue; whereas, Namens and the State appealed from the district court's ruling on the ownership and termination issues.

The lower court affirmed the district court on the termination and ownership issues but reversed on the regulatory issue, holding that the Tribes' Shoreline Protection Ordinance was a valid exercise of tribal authority because no "significant federal interests would be impaired." 665 F. 2d at 963. Also, it sought only to regulate tribally owned property—the south half of the lake, and the conduct sought to be regulated "has the potential for significantly affecting the economy, welfare, and health of the Tribes" because unregulated conduct would affect "one of the most important tribal resources." *Confederated Salish & Kootenai Tribes v. Namen,* 665 F. 2d at 964, App. A at 30.

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[7]The Tribes did not appeal that portion of the district court's ruling dismissing the "abuse" counts.

Although Namen also asserted that his riparian title extended to low-water mark pursuant to *Wilson v. Omaha Indian Tribe*, 442 U. S. 653, 61 L. Ed. 2d 153 (1979), the lower court did not specifically rule on this question.[8] From the decision on the regulatory and ownership issues, Namen and the State of Montana petition this Court for a Writ of Certiorari to issue to the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. Reasons for Granting the Writ.

A. The Lower Court's Decision Stands in Irreconcilable Conflict with this Court's Recent Explication of the Equal Footing Doctrine in Montana v. United States, 450 U. S. 544 (1981).

Despite this Court's most recent reinforcement of the Equal Footing Doctrine as the cornerstone supporting the States' claims to the beds of navigable waters within their borders, the lower court has held that the Treaty of Hellgate, 1855, 12 Stat. 975 (App. F), conveyed the south half of Flathead Lake, a navigable body of water,[9] to the Tribes. This result was produced even though (1) the treaty which created the Flathead Indian Reservation is substantively indistinguishable from the Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (App. H),

[8]The trial court did address this issue but held, following the circuit court's holding in *United States v. Montana*, 604 F. 2d 1162 (9th Cir., 1979), and in *Rochester, supra*, that the Tribes owned title to high-water mark. Mem. Op. at 13-14, App. B at 50-52.

[9]See note 2, *supra*. By 1845, the Equal Footing Doctrine had been firmly established (*Pollard's Lessee v. Hagan*, 44 U. S. (3 How.) 212 (1845)), and Congress was cognizant of that doctrine in 1859 when it ratified the Hellgate Treaty. *Montana v. United States*, 450 U. S. 544, 502, n. 2 (1981); *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 588 (1977).

construed by this Court in *Montana v. United States*, 450 U.S. 544 (1981); (2) no unusual public exigency existed in 1855 which would support departure from the Equal Footing Doctrine; (3) there were no facts to rebut the "strong presumption" in favor of state ownership of such waters; (4) nearly all lands riparian to the lake within the reservation have been alienated in fee to non-Indians; and (5) a navigational servitude had been imposed upon the lake.

An analysis of the lower court's opinion discloses that it had three purported reasons for refusing to follow *Montana v. United States*. First, the lower court said that its earlier decision in *Montana Power Co. v. Rochester*, 127 F. 2d 189 (9th Cir., 1942), having stood unaltered for 50 years, is "strongly supported by *stare decisis*" to the point where it has taken on the characteristics of a rule of "property law." 665 F. 2d at 960. Second, the court said the Hellgate Treaty differed significantly from the 1968 Fort Laramie Treaty (15 Stat. 649, App. H) in that the Hellgate Treaty "referred to a lake in defining the boundaries of the reservation." 665 F. 2d at 961-962, App. A at 26. Finally, the court perceived a "public exigency" existed in 1855, which, apparently, in the opinion of the lower court, did not exist in 1868, in that one of the tribes located on the Flathead Indian Reservation "depended heavily on fishing" and the Office of Indian Affairs was urgently pressing the Senate to ratify the Hellgate Treaty so as to open large areas of the Washington Territory to settlement. 665 F. 2d at 962, App. A at 27-28. It is patent that in reaching the result it did, the lower court reversed the priority of those significant factors which bear upon the ownership issue.

In *Montana v. United States, supra*, this Court stated that in approaching the question of whether navigable

waters within an Indian reservation have been conveyed out of the trust imposed by the Constitution (*e.g., Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373, 374 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)), one must:

> " • • • begin with a strong presumption against conveyance by the United States • • • and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain • • • ' or was rendered 'in clear and special words' • • • or 'unless the claim conferred in terms embraces the land under the waters of the stream,'." 450 U. S. at 501-502.

To overcome this presumption, treaty intention must be "'plain,'" or the treaty must utilize "'clear and special'" words or terms which embrace the land under the lake. *Ibid.*, 450 U.S. at 552. The lower court found such an intent in treaty language which is virtually identical to that approved by Congress when it ratified the Second Treaty of Fort Laramie 1868 (App. H),[10] although the

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[10]Article II of the Hellgate Treaty reserves for the "use and occupation" of the Tribes the following tract of land:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west of Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning."

Article 2 of the 1868 Fort Laramie Treaty reserved for the "absolute and undisturbed use and occupation" of the Crow Tribe the following tract:

> "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana

(Continued on following page)

Fort Laramie Treaty did not contain a provision like Article VI[11] of the Hellgate Treaty. Also, the Tribes did not have a provision requiring their consent to future cessions.[12] Thus, the lower court consciously rejected both the presumption against conveyance and the requirement for specially tailored language. 665 F. 2d at 961, n. 7, 962.

The Second Treaty of Fort Laramie, originally describing the boundaries of the reservation, and Congress, in subsequently diminishing it, made specific reference to navigable waters, the Yellowstone and the Big Horn Rivers. In fact, in 1958, in describing the take area for Yellowtail Dam, Congress made specific reference to the "middle of the thread of the Big Horn River." Act of July 15, 1958, P. L. 85-523, 72 Stat. 351. See also Act of April 11, 1882, Chapter 74, 22 Stat. 42; Act of March 3, 1891, Chapter 543, 26 Stat. 981, 1039-40. Such references, however, since they did not specifically embrace the beds of the rivers or the land underneath the waters, were insufficient to overcome the presumption created by the Equal Footing Doctrine.[13]

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Territory; thence north along said 197th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *."

[11]See note 19, *infra*. Article VI of the Hellgate Treaty was construed by Congress as the predicate for ultimately making available for settlement all but 100,000 acres of reservation land. Senate Report No. 1930, 58th Cong., 2nd Ses., April 7, 1904, App. K at 257; see also House Report No. 1678, 58th Cong., 2nd Ses., App. J at 246.

[12]See, however, Article 11 of the Fort Laramie Treaty. App. H at 233.

[13]Indeed, in dissent, Justice Blackmun made specific reference to this "middle of the thread" description to contend that ownership of the river lay in the Crow Tribe. 450 U. S. at 577, and n. 13.

This Court held that the Crow treaties, even though making reference to the thread of the river, and even though the Big Horn River flowed through the heart of the reservation, failed to overcome:

> "the established presumption that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty. * * * Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." 450 U. S. 553, 554.

The mere fact that the bed of the south half of Flathead Lake "lies within the boundaries described in the (Hellgate) treaty does not make" the lakebed "part of the conveyed land, especially when there is no express reference to the (lakebed) that might overcome the presumption against its conveyance." 450 U. S. at 554; parenthetical words substituted.

Moreover, the "public exigency" which the lower court perceived to exist in 1855 was not unlike that which existed in 1868, for in 1868, public and government pressures were forcing the United States to treat with the Crow. J. Blackmun dissenting, 450 U. S. at 571-573. However, the fundamental purpose of both the 1855 and 1868 treaties was the same: To convert the tribes from a "nomadic, hunting tribe to a settled, agricultural people." 450 U. S. at 571; see also Articles IV and V, Hellgate Treaty.[14] App. F at 210-211.

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[14] In the Official Proceedings of the Council with the Flathead, Kootenai, and Upper Pend d'Oreille Indians Commencing July 7 and ending July 16, 1955 (National Archives Record Group No. 75, Treaty File No. 295, Item No. 1), at pp. 5-7, 14, 25-27, 29-30, 35-40, "Treaty Minutes," are numerous statements by Governor Stevens and Indian representatives which relate to this essential purpose.

The lower court also held that one of the Tribes heavily depended upon fishing, and, therefore, this "public exigency" warranted departure from the Equal Footing Doctrine. However, the lower court totally failed to recognize that Article III of the Hellgate Treaty restricted "exclusive" fishing rights to the streams which border or run through the reservation. App. F at 209.[15] Even to the "unlettered" Indian, a lake "'180 square miles large'" could hardly be construed as a "stream."[16] Also, it was only one tribe, the Lower Kootenai, which relied upon fishing (665 F. 2d at 962, App. A at 28); however, the other—and more populous tribes—the Flathead, Upper Kootenai, and Pend d'Oreille, pursued the buffalo culture, just as did the Crow.[17] *Confederated Salish & Kootenai Tribes v. United States*, 8 Ind. Cl. 40, 43, 46, 47, 51, 52.[18]

Finally, there was absolutely no evidence that either at the time of the treaty or subsequently the Tribes were solely or heavily dependent upon fishing for their economy or their diet and certainly no evidence that any one of the Tribes relied upon any fishery provided by Flat-

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[15]The Tribes' vocabulary included words for "stream," "river," and "lake." Giorda, Reverend J. S. J., *A Dictionary of the Kalispell or Flathead Indian Language*, compiled by the Society of Jesus, Part III, St. Ignatius, Mont., 1877-1879, pp. 217, 318 & 374.

[16]Cf. *Namen I* at 380 F. Supp. at 458; App. D at 182. This Court has held that liberal rules of construction are not a license to rewrite Indian treaty language. *DeCoteau v. District County Court*, 420 U. S. 425, 447 (1975).

[17]However, the Crow did not disdain fish. This Court merely held fishing "was not important to their diet or way of life." 450 U. S. at 556. See also J. Blackmun's dissent, 450 U. S. at 573, n. 7.

[18]One of the purposes for the Treaty of the Upper Missouri, 1855, 11 Stat. 657, App. G, was to guarantee to the tribes common access to their traditional *hunting grounds*. Articles 3, 4, 5, and 6.

head Lake. For example, it was the Pend d'Oreille Tribe (following the buffalo culture) which looked upon the Flathead Lake region as their territory, not the Kootenai. *Confederated Tribes, etc. v. United States, supra,* 8 Ind. Cl. at 57-58.

The lower court was, therefore, reviewing a factual situation similar to that studied by the lower court in *Skokomish Indian Tribe v. France,* 320 F. 2d 205 (9th Cir., 1963). *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918) (cited by the *Rochester* court), is clearly inapposite, for in that case, the "fishery" surrounding the Annette Islands "would afford a primary means of subsistence and a promising opportunity for industrial and commercial development" (*Id.,* 248 U.S. at 88-89); whereas, the Flathead Reservation was to provide the Tribes with an agrarian economy. N. 16, *supra.*

Furthermore, as observed by this Court in *Massachusetts v. New York, supra,* 271 U.S. at 88:

> "It would be difficult to suggest any purpose which the high contracting parties could have had in mind which would have been furthered by a grant to (the Tribes) of a fee in the bed of the lake. The right of (the Tribes) and her grantees to use the waters of the lake was amply secured by a clause of the treaty which provided that they would enjoy 'the same and equal rights respecting the navigation and fishery' on the lake as are enjoyed by all other citizens." (Parenthetical words inserted.) See, e.g., Article 8, Treaty of the Upper Missouri and Article III of the Treaty of Hellgate, "the right of taking fish at all usual and accustomed places, in common with citizens of the territory * * *." App. F at 209.

It is also obvious that the rule of "property law" relied upon by the lower court breaks precedent with an almost unbroken line of federal decisions which hold that

navigable waters are owned by the respective states. *E.g. Martin v. Waddell*, 41 U. S. (16 Pet.) 366 (1842); *Pollard's Lessee v. Hagan*, 44 U. S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U. S. 1 (1894); *United States v. Holt State Bank*, 270 U. S. 49 (1926); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977); and most recently, *Montana v. United States*, 450 U. S. 544 (1981).[19] This means that riparian ownership is governed by state law, not federal law. *Shively v. Bowlby, supra*; *Oregon v. Corvallis Sand & Gravel Co., supra*.[20]

Flathead Lake is drawn down 10 feet below ordinary high-water mark for all but 10 weeks out of the year. Almost 100 percent of land riparian to the south half of the lake is owned in fee by non-Indians. Thus, the "rule of property law" adopted by the lower court would create

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[19] *Choctaw Nation v. Oklahoma*, 397 U. S. 620 (1970), discussed by this Court in *Montana v. United States, supra*, 450 U. S. at 555, n. 5, held that certain Indian tribes, because of the unique treaty language involved, owned the bed of the Arkansas River; however, the circumstances which led this Court to so hold are clearly non-existent in this case, for instead of guarantees that the reservation would never become part of any state, the treaty itself contemplated the reservation would be embraced within a future state. Article 6 of the Omaha Treaty, March 16, 1854 (10 Stat. 1033), was incorporated by reference in Article VI of the Hellgate Treaty (App.F at 212) and specifically mentioned that restrictions on alienation "shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." Additionally, the Tribes were not granted the fee to their reservation lands as was the situation in *Choctaw, supra*.

[20] In Montana, the rule of property law which has existed since 1895 (Section 1291, Mont. Civ. C., 1895), and which applies not only to every other navigable body of water in the state, including a portion of the Big Horn River which bisects the Crow Indian Reservation, but also which applies to the north half of Flathead Lake, is that the riparian owner owns to low-water mark. 70-16-201, M. C. A., 1981; *Fawcette v. Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *cf. Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson v. Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895).

the anomalous situation where the north half of the lake is governed by traditional Montana property law, and in the south half of the lake, a strip of land which would ordinarily be owned by the riparian owner, would be owned and controlled by the Tribes. This Court has plainly indicated that it would not approve such a result. *Massachusetts v. New York*, 271 U.S. 65, 91-92 (1926).

Moreover, the lower court clearly misconceived the thrust of the doctrine of *stare decisis*. While the district court felt compelled to follow the lower court's *Rochester* decision (See, *e. g.*, Mem. Op. at 12, App. B at 52; *United States v. Pollmann*, 364 F. Supp. 995 (D. Mont., 1973).),[11] however, the lower court was not itself *bound* to follow *Rochester (Hertz v. Woodman*, 218 U.S. 205, 212 (1910)), particularly when adherence to that decision "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 241 (1970). The lower court's decision collides head-on with an intrinsically "sounder" and "verified" policy—the Equal Footing Doctrine, which has stood the test for almost 140 years.

Most importantly in this case, just as in *Oregon v. Corvallis Sand & Gravel Co., supra*, "we are not dealing with substantive property law as such, but rather, with an issue substantially related to the constitutional sovereignty of the states." 429 U.S. at 381; *cf. Montana v.*

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[11]Other cases citing *Rochester* as authoritative on the ownership issue such as *Montana Power v. F. P. C.*, 298 F. 2d 338 (D. C. Cir., 1962); *Montana Power Co. v. F. P. C.*, 445 F. 2d 739 (D. C. Cir., 1970), cert. den. 400 U. S. 1013 (1971), involve one of the parties to the *Rochester* decision, The Montana Power Company, and, therefore, the power company was estopped to challenge the decision for which it was responsible.

United States, supra. Thus, *stare decisis* plays "a less important role" than in cases involving merely property law. Montana was never a party to *Rochester* and, prior to this litigation, has not been given an opportunity to challenge *Rochester* and illustrate its fundamental weaknesses and inherent error. Just as *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), was a departure from settled property law principles; so also is *Rochester* such a departure. *E.g., Corvallis, supra*, 429 U.S. at 374, 381; *Shively v. Bowlby, supra. Cf. City of Berkeley v. Superior Court of Alameda*, 162 Cal. Rptr. 327, 606 P. 2d 362 (1980), cert. den. 449 U.S. 840 (1980).

Moreover, *Rochester* did not analyze the Treaty of Hellgate in light of the "strong presumption" against alienation created by the Equal Footing Doctrine. *Montana v. United States, supra; United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). In fact, the *Rochester* court was neither cited to nor did it cite the *Holt State Bank* case. *Rochester* actually employed a presumption which favored the Tribes, not the State. 127 F. 2d at 191, 192. Rather than inquiring whether the treaty language was "plain" or utilized "clear and special" words or terms which embraced the land under the lake, the Court merely said that the "treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region" (*Ibid.* at 191.) but without setting forth the specific language that actually said that.

The lower court also wholly ignored the bearing the navigational servitude and the opening of the reservation had on the ownership issue. *Cf. Montana v. United States*, 450 U.S. at 555. Only three short months after the Hell-

gate Treaty was negotiated, Governor Stevens met with, *inter alia*, the Blackfeet and the Flathead, to negotiate the Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657, App. G. Among others, Victor, Alexander, Michelle and Little Michelle, chiefs of those tribes who signed the Hellgate Treaty, also executed the Treaty of the Upper Missouri. Although the treaty was negotiated after the Hellgate Treaty, it was ratified by Congress before it ratified the Hellgate Treaty.[22] The Treaty of the Upper Missouri had a significant impact upon the "exclusivity" promised in the Hellgate Treaty, for it provided that citizens of the United States could "pass unmolested through the countries" respectively occupied by the various tribes signatory to the treaty and further "that the navigation of all lakes and streams shall be forever free to citizens of the United States." Articles 7 and 8, App. G at 220-221.[23]

In 1904, Congress opened the reservation to non-Indians, Act of April 23, 1904, 33 Stat. 302 (App. I). As a result of that opening, non-tribal members now far outnumber tribal members.[24] Nearly 100 percent of all land riparian to the lake is owned by non-Indians, among whom are the State of Montana and James M. Namen.

Congress specifically encouraged non-Indian ownership of riparian lands when it passed the Act of April 12, 1910, 36 Stat. 296, "the Villasites Act," which provided that lands bordering on the south half of Flathead Lake

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[22]The Hellgate Treaty was ratified March 8, 1859; whereas, the Treaty of the Upper Missouri was ratified April 15, 1856.

[23]*Namen I*, of course, had firmly established Petitioners' rights to navigate the lake. See also Act of March 3, 1811, 2 Stat. 606, 33 U. S. C. § 10; Act of May 18, 1796, 1 Stat. 468, 43 U. S. C. § 931.

[24]See note 1, *supra*.

should be subdivided into lots and sold at public auction. Senate Report No. 117, 61st Cong., 2nd Ses., January 26, 1910 (App. L).

Surely the fact (1) that the Tribes have alienated nearly 100 percent of all riparian land, including several large islands within the south half of the lake; (2) that the agency charged with the responsibility of selling off riparian land "touted" those lands as lying within a "former" Indian reservation; and (3) that "(t)he lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders * * * (and) * * * (t)he shores are well adapted for boat landings and the erection of wharves," dispels any notion that the lake had been reserved for the Tribes. App. M at 268.

A similar factual situation was studied by this Court in *Puyallup Tribe, Inc. v. Washington State Game Dept.*, 433 U.S. 165 (1977) (*"Puyallup III"*). In *Puyallup III*, this Court construed the treaty with the Nisqualli (December 26, 1854, 10 Stat. 1132) against the backdrop of subsequent legislation and events. Article II of the treaty established a reservation for the tribe's "exclusive use" and provided that no "white man (was) to be permitted to reside upon the same without permission of the tribe and the superintendent or agent." 433 U.S. at 174. By subsequent legislation, similar to the Flathead Allotment Act of 1904, all lands were allotted, and the allottees were permitted to alienate their lands. 433 U.S. at 174. At the time *Puyallup III* was decided, the Indians had alienated all but 22 acres of their reservation, none of which was riparian to the Puyallup River, a navigable stream which bisected their reservation. The tribe argued that the treaty reserved a right to "fish free of state inter-

ference." However, the Supreme Court held that such "an interpretation clashes with the subsequent history of the reservation and the facts of this case." 433 U. S. at 173. In footnote 12, the Court disparaged the tribe's argument that it owned the bed of the river:

> "Counsel for petitioner (the tribe) intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg. 10. This contention is at odds with the otherwise uncontradicted findings below." (*i.e.*, that all but 22 acres had been alienated.)

Even for the dissent in *Montana v. United States*, this would have been a significant factor bearing upon the ownership issue. 450 U. S. at 581, n. 18.

Obviously, if this Court's recent holding in *Montana v. United States* can be so easily sidestepped,[25] as was done by the lower court in this case, it would virtually eviscerate the Equal Footing Doctrine in most of our Western states.[26] For these reasons, this Court should review the lower court's decision on the "ownership issue."

B. The Circuit Court's Decision Conflicts with this Court's Recent Holding in Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979).

Throughout the course of this litigation, Namen has consistently asserted that regardless of who owns the south half of Flathead Lake, he owns to low-water mark under state law applied as a federal rule. The lower court

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[25]The lower court was unable to provide any substantive basis why *Montana v. United States* is not controlling. At best, the lower court's decision represents a very superficial effort to reduce this Court's latest elaboration of the Equal Footing Doctrine to an *ad hoc* decision.

[26]Governor Stevens negotiated numerous Indian treaties with other tribes containing virtually the same "boilerplate"

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did not specifically address this issue but, following *Rochester, supra,* held the Tribes' ownership extended to the bed of the south half of Flathead Lake. 665 F. 2d at 962, App. A at 28.

In *Wilson v. Omaha Indian Tribe, supra,* this Court held that questions of riparian ownership are governed by the existing state rule in two different contexts: First, when the subject land was granted away by patents (442 U. S. at 671); and, secondly, when the subject land remained within the original boundaries of the reservation (442 U. S. at 678-679).

This case most closely approximates the first situation exemplified by *Oklahoma v. Texas,* 258 U. S. 574 (1922), and its progeny[27] for here, the United States is-

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language as is contained in the Treaty of Hellgate. Many other treaties make reference to navigable rivers within state boundaries. See, e. g., Treaty with the Quinaielt, July 1, 1855, II Kapp. 719; Treaty with the Nez Perces, June 11, 1855, II Kapp. 702; Treaty with the Yakima, June 9, 1855, II Kapp. 698; Treaty with the Walla Walla, June 9, 1855, II Kapp. 694; Treaty with the Makah, January 31, 1855, II Kapp. 682; Treaty with the S'Klallam, January 26, 1855, II Kapp. 674; Treaty with the Dwanicn, January 22, 1855, II Kapp. 669; Treaty with the Nisqualli, December 26, 1854, II Kapp. 661; Treaty with the Tribes of Middle Oregon, June 25, 1855, II Kapp. 714; Treaty with the Umpaqua, November 29, 1854, II Kapp. 657; Treaty with the Yankton Sioux, April 19, 1858, II Kapp. 776. Permitting the lower court's decision to stand will merely perpetuate case-by-case litigation.

[27] *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U. S. 77, 88-89 (1922); *United States v. Champlin Refining Co.,* 156 F. 2d 769, 773 (10th Cir., 1946), aff'd 331 U. S. 788-789 (1947); *United States v. Oklahoma Gas & Electric Co.,* 318 U. S. 206, 209-210 (1942); compare *Whitaker v. McBride,* 197 U. S. 510 (1904). The rule articulated in the cited cases has been consistently applied in similar controversies—some involving former Indian lands. See, e. g., *Hardin v. Shedd,* 190 U. S. 508, 509 (1902); *Shively v. Bowlby,* 152 U. S. 1, 45 (1894); *Hardin v. Jordan,* 140 U. S. 371 (1891); *Packer v. Bird,* 137 U. S. 661 (1891); *Choctaw & Chickasaw Nations v. Board of County Commissioners,* 361 F. 2d 932, 933 (10th Cir. 1966);

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sued patents "granting former reservation lands." 442 U. S. at 671, n. 18. The lands held by Namen and the State of Montana are similar "to the several hundred acres of land within the Barrett Survey" which are held in fee and "concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals." 442 U. S. at 674.

But regardless of whether or not the first or second *Wilson* rule would be applied, the federal courts would still fashion a federal rule based upon state law for the reason there is no need for "a uniform national rule" to determine riparian ownership, and it is an area in which the state has a substantial interest "in having their own law resolve controversies such as these." 442 U. S. at 674.

Under Montana law, the owner of land riparian to navigable waters owns to low-water mark "except where the grant * * * indicates a different intent." 70-16-201, M.C.A., *supra*, n. 20; see also *Montana Power Co. v. Rochester, supra*, 127 F. 2d at 191. App. C at 163. The grant to Morais was absolute on its face and was subject to no material reservations or restrictions. App. P. Here, adoption of state law as the federal rule would make eminent good sense in view of the fact that the lake is

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Choctaw & Chickasaw Nations v. Seay, 235 F. 2d 30, 35 (10th Cir., 1956); *Herron v. Choctaw & Chickasaw Nations*, 228 F. 2d 830, 832 (10th Cir., 1956); *United States v. Elliott*, 131 F. 2d 720, 723 (10th Cir., 1942); *Shore v. Shell Petroleum Corp.*, 55 F. 2d 696, 902, aff'd 60 F. 2d 1, 2 (10th Cir., 1932); *United States v. Hayes*, 20 F. 2d 873, 889-890 (8th Cir., 1927), cert. den. 275 U. S. 555; *United States v. Heinrich*, 12 F. 2d 938, 939 (D. Mont., 1926). While as pointed out in *United States v. Oregon*, 295 U. S. 1, 27-28 (1935), the construction of federal grants is initially a federal question, the federal courts traditionally defer to state rules of construction.

at high water only 10 weeks out of each year and, when at low water, a navigable depth is reached 450 feet from the high-water mark. See n. 4, *supra*. The lower court's failure to address this issue merits review.

C. The Lower Court's Decision Validating the Tribes' Shoreline Ordinance Is in Conflict with the Restrictions Placed on Indian Civil Regulatory Authority by Montana v. United States and Other Recent Decisions.

The lower court's holding that the Shoreline Protection Ordinance was valid under the criteria applied by this Court to a tribal cigarette tax in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), and under the criteria applied to tribal restrictions on hunting and fishing on non-member fee lands set down in *Montana v. United States* is clearly in error.

The lower court's decision on the regulatory issue was premised upon three grounds: First, pursuant to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 135, 153 (1980), the exercise of tribal authority in this case, which took its form in the Shoreline Ordinance, was not "inconsistent with the overriding interests of the National Government." 665 F. 2d at 963, App. A at 30. Secondly, even under the rule laid down in *Montana v. United States*, this Court approved regulation of non-Indian activities (1) when it took place on Indian lands or (2) where it "has the potential for significantly affecting the economy, welfare, and health of the Tribes." 665 F. 2d at 964, App. A at 32. The Tribes' ordinance, in the opinion of the lower court, satisfied both of the latter two requirements, for in this case, the Tribes did own the south half of the lake, and because of this ownership, unregulated conduct will "increase water pol-

lution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake," one of "the most important tribal resources." *Ibid.*

Although the lower court perceived a conflict in this Court's decision on Indian regulatory authority expressed in *Colville, supra,* as opposed to that expressed in the *Oliphant* and *Wheeler*[28] rationale adopted in *Montana v. United States* (665 F. 2d at 963), thus inviting this Court's clarification, it is patent that upon careful analysis, there exists no conflict. Additionally, it is clear that the Tribes Shoreline Ordinance would fail to pass muster under either the *Colville* or the *Oliphant* line of cases.

The lower court erroneously held that under *Colville,* Indian tribes could exercise regulatory authority over non-Indians anytime that exercise did not conflict with "overriding federal interests." 665 F. 2d at 963, App. A at 30. Obviously, this interpretation is dangerously overbroad and illustrates a fundamental lack of understanding of what *Colville* actually decided.

Colville centered upon the power of an Indian tribe to tax sales of cigarettes on "Indian lands." This limited taxing authority was only approved because it (1) took place on Indians lands (2) where the Tribes had a "significant interest in the subject matter" and (3) in a situation which would not be "inconsistent with the overriding interests of the National Government, as when (they) seek * * * to prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights." 447 U. S. at 153, 154, citing *Oliphant* and *Wheeler.*

Applying here the first requirement, i.e., that the activity sought to be regulated occur on Indian lands, if

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[28] *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191 (1978); *United States v. Wheeler,* 435 U. S. 313 (1978).

the south half of the lake is not owned by the Tribes,[29] that requirement is not met. Under *Montana v. United States*, this would also have been the determining factor. 450 U. S. at 557, 558.

Thus, here, just as in *Montana v. United States*, "a substantial part of (the Tribes') claim of power to control" riparian rights depends upon their alleged ownership of the bed of the south half of Flathead Lake. 450 U. S. at 550, 557-561. It is self-evident that without that ownership, they can neither satisfy the remaining *Colville* requirements, nor can they come within the limited exceptions noted in *Montana v. United States*, 450 U. S. 565-566. Without ownership, the Tribes have failed to prove any significant interest in regulating dockage and wharfage rights, and certainly regulation of those rights would collide with rights which non-Indians have the right to protect under the Bill of Rights. *Cf. Colville, supra*, 447 U. S. at 153-154. Petitioners have not entered into any "consensual relationship" with the Tribes, and the Tribes consciously rejected at least three opportunities to prove that unregulated shoreline had some direct effect "on the political integrity, the economic security, or the health and welfare of the" Tribes.[30] *Montana v. United States*, 450 U. S. at 565, 566.

Moreover, under *Colville*, regulation would appear to collide with overriding federal interests. Here, the federal government has an interest in seeing that nonmember rights are protected by the Bill of Rights. The ordinance was enacted by a government in which non-

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[29]For that matter, if Petitioners own to low-water mark (See Part B, *supra*.), it would seem that lack of tribal ownership would prevent application of tribal authority.

[30]Mem. Op. at 6-8, App. B at 42-44. The Tribes did not appeal dismissal of those counts of their complaint which raised these precise issues.

members do not participate. It is enforced and administered by a government in which the non-member has no vote and from whose decisions there is no appeal. See Part D, *infra;* App. N. *Cf., Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. 209, 210.

The "National Government" also has an "overriding" interest to see that the "justifiable expectations" of non-members who are enticed onto the reservation by a federal "sales pitch" are not frustrated. *Rosebud Sioux Tribe v. Kneip,* 430 U. S. 584, 604, 605; see also App. M. Here, the non-member has exercised his riparian rights without challenge for over 50 years. *Namen I, supra,* 380 F. Supp. at 466; App. D at 200. While the lake and docks and wharves have been comprehensively regulated by the State, this is the first instance the Tribes have attempted to exert any authority over riparian rights. Mem. Op. 39-44, App. B at 84-86. *Cf. Montana v. United States,* 450 U. S. at 566-567; see also App. O.

Even if the lakebed is owned by the Tribes, still, the lower court was in error in failing to recognize that the non-member riparian rights were federally created concomitant with the extensive dilution of exclusivity effected by the Allotment Act of 1904. 33 Stat. 302, App. I.

The Tribes have never exercised "exclusive use of the south half of Flathead Lake. Treaty of the Upper Missouri, *supra,* Articles 7 and 8, App. G. Cf. *Montana v. United States,* 450 U. S. at 559. As was pointed out by the trial court in *Namen I,* even assuming that title to the south half of the lake was held in trust for the Tribes; nevertheless, Congress had "the power to grant title or rights in the bed and banks of the lake" and, "barring congressional action," could "never secure legal ownership as a state does." 380 F. Supp. at 480.

Puyallup III, construed by this Court in *Montana v. United States*, "indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U. S. at 561. The allotment policy which was fastened upon the Tribes in 1904 did not suggest that non-Indian settlers would be subject to "tribal regulatory authority." 450 U. S. 559, n. 9. It is hardly "likely that Congress could have imagined that peaceful assimilation could be advanced if fee holders" to riparian lands, who purchased land at public auction pursuant to a "sales pitch" authored by the federal government, would then be subject to Indian control. *Id.*

It is clear that regulation of federally created riparian rights owned by non-members on lands either no longer owned by the Tribes or, at the very least, upon lands in which non-members have significant property interests "bears no clear relationship to tribal self-government or internal relations." *Montana v. United States*, 450 U. S. at 564, and n. 13. The Shoreline Ordinance is inconsistent with the diminished authority enjoyed by Indian tribes, particularly when that authority is sought to be exercised over non-member property rights and activities. *Ibid*, 450 U. S. at 565.

This case is another attempt by an Indian tribe to exercise non-congressionally sanctioned regulatory authority over nonmembers occupying fee lands and exercising rights created by express congressional action. It is just this type of exercise of authority which has been withheld by this Court. *Montana v. United States, supra*, 450 U. S. at 564-565; *United States v. Wheeler*, 435 U. S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978). This Court has unanimously agreed that "exercise of tri-

bal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." *Montana v. United States, supra,* 450 U. S. at 564. Cf. *Merrion v. Jicarilla Apache Tribe,* — U. S. —, 71 L. Ed. 2d 21 at 51 (1982), J. Stevens dissenting. Yet in this case, despite the most recent admonitions of this Court, that is precisely what the lower court has held—a holding which is totally inconsistent with this Court's prior rulings and which surely merits review.

D. The Tribes' Ordinance 64-A (Revised) Violates the Equal Protection and Due Process Guarantees of the Fifth Amendment.

The Shoreline Protection Ordinance purports to regulate riparian rights exercised by all persons including local and state governmental units and agencies. However, it excludes the "Tribes or any person acting as the Tribes' agent."[31] App. N at 273. The ordinance is clearly an attempt by the Tribes to exercise police power over non-members and their property. See Sections 3, 4, 5, 6, 7, and 11, which characterize various activities as "unlawful" and subjects the person in breach of the ordinance to a fine for non-compliance. App. N at 274, et seq. Final decisions are relegated either to the tribal court or to the tribal council, from which no appeal may be taken. Non-Indians did not and do not participate in the Tribes' legislative council, nor are they permitted to be members of the tribal court or council.[32] This ordinance was approved by the

[31]Ordinarily, such a facially discriminatory act would be suspect and subjected to the strictest scrutiny. *University of California Regents v. Bakke,* 438 U. S. 265, 290 (1978).

[32]Traditionally, a voter's disenfranchisement has been grounds to invoke "due process and equal protection." *Kramer*

(Continued on following page)

Department of Interior and enforcement sought by the United States in this action.

In *Burton v. Wilmington Parking Authority*, 363 U. S. 715 (1961), this Court struck down racially discriminatory policies of a "purely private" party, where it found substantial state involvement. In so doing, the Court noted:

> "• • • The State has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination."

This language is uniquely apropos to the actions of the United States Government in the instant case.

In *Holt Civic Club v. Tuscaloosa*, 439 U. S. 60 (1978), this Court made it clear that without personal involvement in the legislating government, ordinances under attack could survive a constitutional challenge only if the person attacking the statutes did not reside within city boundaries and only when the jurisdiction exercised was quite limited. Neither of these two factors apply to this case, since it is precisely because the non-Indian resides within the reservation that the Tribes seek to exert authority over him. Moreover, where the claim of governmental power is analogous to exercise of zoning or taxing authority, such claim would fail to pass constitutional muster. *Holt Civic Club, supra.* 439 U. S. at 72, n. 8. Finally, it creates a confrontation between a true sovereign, the State of Montana, and a "dependent ward of the federal government." Among the state facilities riparian to Flathead Lake over which the Tribes seek to exercise authority is the Yellow

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(Continued from previous page)

v. *Union Free School District*, 394 U. S. 621 (1969); *Cipriano v. City of Huoma*, 395 U. S. 701 (1969); *Hoenix v. Kolodziejski*, 399 U. S. 204 (1970); *Dunn v. Blumstein*, 405 U. S. 330 (1972); and *cf. Reynolds v. Sims*, 377 U. S. 533, 577 (1964).

Bay Biological Station, created by the Act of March 3, 1905, 33 Stat. 1081 (lands granted to the University of Montana). Under Section 14 of the Enabling Act of 1889, 25 Stat. 676, this university would be under "exclusive control of the State of Montana."

The lower court, in a footnote, rejected Petitioners' claims of constitutional infringement (665 F. 2d at 964, n. 31; App. A at 33), relying upon *Talton v. Mayes*, 163 U. S. 376 (1896), *Groundhog v. Keehr*, 442 F. 2d 674, 678 (10th Cir., 1971); and *Martinez v. Southern Ute Tribe*, 249 F. 2d 915, 919 (10th Cir., 1957), cert. den. 356 U. S. 960 (1958).[33] Although this Court has stated that tribal rights of *self*-government are immune to Fourteenth or Fifth Amendment challenges (*Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978)), it has also held that it has a duty to protect basic "personal" rights and "liberties" of all its citizens. *Oliphant, supra*, 435 U. S. at 210. Cf. *Colville, supra*, 447 U. S. at 153-154. Here, a non-tribal member is exposed to fines and, presumably, other sanctions by a jurisdiction "separated by race (and) tradition" seeking to impose "an external and unknown code" which "judges them by a standard made by others and not for them." *Ex Parte Crow Dog*, 109 U. S. 556, 571; *Oliphant, supra*, 435 U. S. 210, 211. In *Oliphant*, it was just such considerations which led the Court to say that they "speak

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[33]Each of the cases involved instances of tribal *self*-government, *i. e.*, members of the Indian community were seeking protection under the Fifth Amendment. Therefore, since only "internal" tribal management dependent upon powers of inherent sovereignty, which survived the Indians' "dependent" status, was challenged, it escaped constitutional attack. However, in this instance, the constitutional tension is created where the reach of Indian authority is most attenuated—their relations with "non-members of the tribe" (*United States v. Wheeler*, 435 U. S. 313, 326 (1978)), who have always had the protective cloak of the Bill of Rights to warm them. *Colville, supra*, 447 U. S. 153, 154.

equally strongly against the validity of respondent's" criminal jurisdiction over non-Indians. *Id.*

In *Colville, supra,* and *Merrion v. Jicarilla Apache Tribe, supra,* the non-member could refuse to buy cigarettes or to exploit Indian-owned resources. Non-member riparian owners, however, can avoid tribal authority only by moving out of the reservation or refusing to exercise the rights conveyed to them by the federal government. It is this type of regulatory authority which creates constitutional tension and which, therefore, must be declared invalid.

This case is a proper one, we suggest, for this Court to review the claims of Indian tribes to sovereign power over non-members owning fee lands within Indian reservations by explicitly confining tribal powers to tribal *self*-government.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 30th day of June, 1982.

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No. 81-_____

In The

Supreme Court of the United States

October Term, 1981

JAMES M. NAMEN, et al. and STATE OF MONTANA,

Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al. and UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,

Plaintiffs-Appellants/Cross-Appellees,

vs.

James M. NAMEN, et al., City of Polson, Montana, and State of Montana,
Defendants-Appellees/Cross-Appellants.

Nos. 80-3189, 80-3190, 80-3196, 80-3216 and 80-3274.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 8, 1981.

Decided Jan. 11, 1982.

Confederated Tribes of the Flathead Reservation brought action against owners of land fronting on lake in reservation seeking declaratory and injunctive relief against defendants for allegedly trespassing on tribal lands by building and maintaining docks, breakwater and a storage shed. The United States District Court for the District of Montana, William J. Jameson, J., 380 F. Supp. 452, granted partial summary judgment for defendants, and that decision was affirmed on appeal, 534 F. 2d 1376. Thereafter, the United States District Court for the District of Montana ruled that the Tribes had no authority to regulate the riparian rights of defendants, and Indians appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) the Flathead Act of April 23, 1904, providing for allotments of reservation land in severalty to the Indians on the Flathead Reservation and for open-

ing the surplus, unallotted lands to non-Indians, did not terminate the reservation status of the Flathead Reservation, and (2) Confederated Salish & Kootenai Tribes of Flathead Reservation had authority to regulate the federal common-law riparian rights of non-Indians who owned reservation land bordering the south half of Flathead Lake, to which the Tribes had beneficial title, since no significant federal interests were impaired by the tribal regulation, the Tribes were in effect seeking to regulate non-Indians' use of tribal trust land, and the conduct that Tribes sought to regulate had the potential for significantly affecting the economy, welfare, and health of the Tribes.

Affirmed in part, reversed in part, and remanded.

1. Indians

The crucial inquiry where it is alleged that a statute has terminated an Indian reservation is whether Congress intended the statute to have that effect.

2. Indians

Reduction or termination of Indian reservation requires congressional action.

3. Indians

Termination of Indian reservation cannot be inferred lightly, and Congress' intent to terminate must be clear to prevail in the face of the rule that ambiguities are resolved in Indians' favor.

4. Indians

The Flathead Act of April 23, 1904, providing for allotments of reservation land in severalty to the Indians

on the Flathead Reservation and for opening the surplus, unallotted lands to non-Indians, did not terminate the reservation status of the Flathead Reservation, since the Act contained neither an explicit declaration that the reservation was terminated nor explicit language of cession, the Act contained no implicit expressions of an intent to terminate, and neither the legislative history of the Act nor the surrounding circumstances made it clear that Congress intended to terminate the reservation. Act April 23, 1904, § 1 et seq. 33 Stat. 302.

5. Courts

The doctrine of stare decisis applies with special force to decisions affecting title to land.

6. Indians

A reservation of land by sovereign Indian tribes does not, properly speaking, involve a "grant" of public land; nor does it convert public domain into an individual's private property.

7. Indians

The Hell Gate Treaty conveyed beneficial ownership of south half of Flathead Lake to Indian tribes, since the treaty expressly referred to Flathead Lake in defining boundaries of the reservation, and since hydroelectric power development on the Flathead Reservation had proceeded for half a century on the assumption that the tribes owned the south half of the lake.

8. Indians

Confederated Salish & Kootenai Tribes of Flathead Reservation had authority to regulate the federal com-

mon-law riparian rights of non-Indians who owned reservation land bordering the south half of Flathead Lake, to which the Tribes had beneficial title, since no significant federal interests were impaired by the tribal regulation, the Tribes were in effect seeking to regulate non-Indians' use of tribal trust land, and the conduct that Tribes sought to regulate had the potential for significantly affecting the economy, welfare, and health of the Tribes.

Appeal from the United States District Court for the District of Montana; William J. Jameson, Senior District Judge, Presiding.

Before PREGERSON and POOLE, Circuit Judges, and KELLAM*, District Judge.

PREGERSON, Circuit Judge:

These consolidated appeals stem from attempts by the Confederated Salish & Kootenai Tribes of Flathead Reservation [hereinafter "the Tribes"] to regulate the manner in which non-Indians who own land bordering a navigable lake on the reservation exercise their riparian rights. The Tribes seek to enforce an ordinance they enacted in 1977 to regulate both existing and future structures on the bed and banks of the south half of Flathead Lake, to which the Tribes claim beneficial title. The Namens, who are non-Indian riparian landowners, the State of Montana, and the City of Polson, Montana, contest the

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*The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Tribes' efforts.[1] They argue: (1) that the historic Flathead Reservation was terminated in 1904 ["the termination issue"]; (2) that, even if the original reservation still exists, title to the bed and banks of the south half of Flathead Lake is vested in Montana, not in the United States as trustee for the Tribes ["the ownership issue"]; and (3) that in any event the Tribes have no power to regulate how a non-member exercises his or her riparian rights ["the regulatory issue"]. The district court rejected the first two of these arguments, but concluded that the Tribes lacked regulatory authority over non-members. For the reasons set forth below, we affirm the district court's conclusions as to the termination and ownership issues, but reverse on the regulatory issue and hold that the Tribes have the authority to enact the challenged ordinance.

BACKGROUND

The Flathead Reservation was established by the 1855 Treaty of Hell Gate, 12 Stat. 975 (ratified in 1859), in what is now the State of Montana. As defined by the treaty, the reservation contained the southern half of Flathead Lake, a navigable body of water roughly 26 miles long and up to 5 miles wide.

The Act of April 23, 1904, ch. 1495, 33 Stat. 302 [hereinafter "the Flathead Act"], authorized allotments in severalty of Flathead Reservation land to members of the Tribes. The land remaining after allotment was to be made available by presidential proclamation to non-Indians. The Act was implemented by the Proclamation of May 22, 1909, 36 Stat. 2494, which—after a delay—became

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[1]For convenience, these parties will be referred to as "the appellees."

effective May 2, 1910. Pursuant to the new policy, a federal patent was issued in 1910 to Antoine Morais, a Flathead Indian, for an allotment of reservation land.

The Namens (James M., Barbara J., A. J., and Kathryn) are successors in interest to Morais. Their land is riparian to the south half of Flathead Lake. They operate a business called "Jim's Marina" on their land, and have built docks, a breakwater, and a storage shed that extend beyond the high-water mark of the lake onto its banks and bed. The State of Montana and the City of Polson [hereinafter "Polson"] also own land riparian to the south half of Flathead Lake on which are structures extending beyond the high-water mark.

In August 1973 the Tribes initiated the instant litigation by suing the Namens in federal District Court for the District of Montana. The Tribes sought declaratory and injunctive relief against the Namens for allegedly trespassing on tribal lands by building and maintaining their docks, breakwater, and storage shed. Polson intervened as a defendant.

The district court granted partial summary judgment for defendants in August 1974. *Confederated Salish & Kootenai Tribes v. Namen (Namen I)*, 380 F. Supp. 452 (D. Mont. 1974), *aff'd.* 534 F. 2d 1376 (9th Cir.), *cert. denied*, 429 U. S. 929, 97 S. Ct. 336, 50 L. Ed. 2d 300 (1976). The district court held: (1) the Namens' title extends only to the high-water mark; (2) the bed and banks of the south half of Flathead Lake are held by the United States in trust for the Tribes; but (3) the Namens' title includes the federal common law rights of access and wharfage out to navigable water. The court reserved for later determina-

tion the question whether the Namens' structures exceeded what their rights authorized.

In November 1975 Polson filed suit against the Tribes for a declaratory judgment that the Flathead Reservation had been terminated by the 1904 Flathead Act. Montana intervened as a plaintiff. In June 1977 Polson's suit was consolidated with the Tribes' suit.

In July 1977 the Tribes enacted, and the Secretary of the Interior approved, a "Shoreline Protection Ordinance," Ordinance 64A, aimed at regulating riparian structures along the south half of Flathead Lake. In September 1977 the Tribes amended their complaint, adding allegations that the Namens' structures violated Ordinance 64A, abused the Namens' riparian rights, degraded water quality, and interfered with tribal fishing rights. The United States intervened as a plaintiff in October 1977.

In December 1977 the United States, as trustee for the Tribes, filed a separate lawsuit against Polson and Montana, seeking a declaratory judgment that the Flathead Reservation had not been terminated and that the Tribes had authority to regulate use of the bed and banks of the south half of the lake. That suit was consolidated with the other two.

The district court issued its written opinion on April 8, 1980. The court reaffirmed the conclusions it had reached in *Namen I*—particularly, that the United States held title to the south Flathead Lake bed in trust for the Tribes—and additionally held: (1) that there had been no diminishment or termination of the reservation; but (2) that the Tribes had no authority to regulate the riparian rights of the Namens, Polson and Montana.

Each party has appealed from some aspect of the district court's judgment. The Namens (in 80-3189), Montana (in 80-3190), and Polson (in 80-3196) appeal from the rulings on the ownership issue (that the Tribes hold beneficial title to the south Flathead Lake bed) and the termination issue (that the reservation was never terminated). The Tribes (in 80-3216) and the United States (in 80-3274) appeal from the ruling on the regulatory issue (that the Tribes lack authority to regulate non-Indians' riparian rights).[2]

THE TERMINATION ISSUE

The Flathead Act of April 23, 1904, ch. 1495, 33 Stat. 302, provided for allotments of reservation land in severalty to the Indians on the Flathead Reservation and for opening the surplus, unallotted land to non-Indians. The City of Polson argues that this statute terminated the reservation status of the Flathead Reservation. The Namens and Montana adopt Polson's position. The district court, however, rejected this argument. We affirm this portion of the district court's judgment.

[1-3] The crucial inquiry where, as here, it is alleged that a statute has terminated a reservation is whether Congress intended the statute to have that effect. *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 586, 97 S. Ct. 1361, 1363, 51 L. Ed. 2d 660 (1977).[3] Termination cannot be in-

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[2]The Tribes are also appealing the reaffirmance by the district court of its *Namen I* holding that the Namens and Polson have a federal common law right of access and wharfage, but do so merely to preserve the issue and have not argued that issue here.

[3]Reduction or termination of a reservation requires congressional action. *Mattz v. Arnett*, 412 U. S. 481, 504-05, 93 S. Ct. 2245, 2257-58, 37 L. Ed. 2d 92 (1973).

ferred lightly, and Congress's intent to terminate must be clear to prevail in the face of the rule that ambiguities are resolved in the Indians' favor. *DeCoteau v. District County Court*, 420 U. S. 425, 444, 95 S. Ct. 1082, 1092, 43 L. Ed. 2d 300 (1975). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U. S. 481, 505, 93 S. Ct. 2245, 2258, 37 L. Ed. 2d 92 (1973). Neither the face of the Flathead Act, nor its legislative history and the "surrounding circumstances," clearly indicate a congressional intent to terminate the Flathead Reservation.

The face of the Act:

[4] Statutes have expressed an intent to terminate all or part of a reservation in several different ways. Congress frequently made such an intent explicit.[4] On other occasions, Congress used the slightly less explicit "language of cession," by which an Indian tribe would agree to cede, convey, or relinquish all title to part or all of its reservation—language which the Supreme Court has described as "precisely suited" to terminate all of the tribe's interest in the affected land. *DeCoteau v. District County Court*, 420 U. S. 425, 445, 95 S. Ct. 1082, 1093, 43 L. Ed. 2d 300 (1975) (tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and

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[4]See, e. g., Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 ("the Smith River reservation is hereby discontinued"); Act of July 1, 1892, ch. 140, 27 Stat. 62 ("the following described tract or portion of said Colville Reservation . . . is . . . vacated and restored to the public domain"); Act of April 21, 1904, ch. 1402, 33 Stat. 189, 218 ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished").

interest" to the affected lands).[5] In still other situations, courts have found an intent to terminate implicit in statutory references to the "diminished reservation"[6] or to "reduction" of the reservation.[7]

The Flathead Act does not in any of these ways express on its face an intent to terminate the reservation. As the district court observed, it contains neither an explicit declaration that the reservation was terminated nor explicit language of cession. And far from containing implicit expressions of an intent to terminate, the Flathead Act refers to the reservation without any indication that it is to be diminished or terminated. These references are quite similar to language in a slightly later statute that the Supreme Court said "makes it clear that the intention of Congress was that the reservation should con-

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[5] *See also Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 597, 97 S. Ct. 1361, 1368, 43 L. Ed. 2d 300 (1977) (Act of 1904 incorporated cession language whereby Indians agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in affected land); *United States v. So. Pac. Transp. Co.*, 543 F. 2d 676, 695 (9th Cir. 1976) (Indians agreed to "cede, grant and relinquish . . . all right, title and interest" in affected lands); *Ellis v. Page*, 351 F. 2d 250 (10th Cir. 1965) (Indians agreed to "cede, convey, transfer, relinquish, and surrender, forever and absolutely, . . . all their claim, right, title, and interest" in affected lands).

[6] The Act of May 27, 1910, ch. 257, 36 Stat. 440, refers to "the diminished reservation" as well as to "the tract to be ceded." It was held to have diminished the Pine Ridge Reservation in *United States ex rel. Cook v. Parkinson*, 525 F. 2d 120 (8th Cir. 1975), *cert. denied*, 430 U. S. 982, 97 S. Ct. 1677, 52 L. Ed. 2d 376 (1977).

[7] The Act of October 1, 1890, ch. 1271, 26 Stat. 658, was entitled "An Act to provide for the reduction of the Round Valley Indian Reservation . . . and for other purposes." Partly for this reason, it was held to have effected such a reduction. *Russ v. Wilkins*, 624 F. 2d 914 (9th Cir. 1980), *cert. denied*, — U. S. —, 101 S. Ct. 1976, 68 L. Ed. 2d 296 (1981).

tinue to exist as such." *Seymour v. Superintendent*, 368 U. S. 351, 355, 82 S. Ct. 424, 427, 7 L. Ed. 2d 346 (1962) (footnote omitted).[8] Polson is thus mistaken in contending that the language of the Flathead Act does not differ materially from that of statutes that have been held to diminish or terminate reservations.[9]

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[8]*Seymour* involved the Act of March 22, 1906, ch. 1126, 34 Stat. 80, which opened to non-Indian settlement the unallotted lands of the "diminished Colville Reservation" (so-called because the original reservation had been diminished in 1892). Compare, for example, § 2 of the 1906 act ("as soon as the lands embraced within the diminished Colville Indian Reservation shall have been surveyed, the Secretary . . . shall cause allotments of the same to be made") with § 2 of the Flathead Act ("so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner . . . shall cause allotments of the same to be made"), and compare § 6 of the 1906 act (proceeds "shall be . . . deposited . . . to the credit of the . . .tribes of Indians belonging and having tribal rights on the Colville Indian Reservation") with § 14 of the Flathead Act (half of proceeds to be "paid to the said Indians and such persons having tribal rights on the reservation").

[9]The examples Polson gives either do differ materially from the Flathead Act or are otherwise distinguishable. The 1910 Pine Ridge Act [Act of May 27, 1910, ch. 257, 36 Stat. 440] refers to "the diminished reservation"; the 1890 Round Valley Act [Act of October 1, 1890, ch. 1271, 26 Stat. 658] is titled in part "An Act to provide for the reduction of the Round Valley Indian Reservation"; and the 1908 Cheyenne River Act [Act of May 29, 1908, ch. 218, 35 Stat. 460] speaks of "the respective reservations thus diminished." Furthermore, this last statute was explicitly held *not* to diminsh the reservation in *United States ex rel. Condon v. Erickson*, 478 F. 2d 684 (8th Cir. 1973). The 1907 and 1910 acts [Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of May 30, 1910, ch. 260, 36 Stat. 448] interpreted in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 97 S. Ct. 1361, 43 L. Ed. 2d 300 (1977), though not themselves materially different from the Flathead Act, were held to diminish the Rosebud Reservation only because of their perceived relationship to an earlier statute [Act of April 23, 1904, ch. 1484, 33 Stat. 254] that contained explicit language of cession.

Polson also contends that certain specific provisions of the Flathead Act suggest an intent to terminate reservation status. One is section 8, granting two sections out of every township in the surplus lands to Montana for school purposes. The other is section 21, added by a 1909 amendment to the Act,[10] extending the federal ban on liquor in Indian country to the surplus lands of the reservation. It is true that similar provisions were held in *Rosebud, supra,* 430 U. S. at 611-14, 97 S. Ct. at 1375-76, to support a finding of intent to disestablish the affected lands. But the presence of such provisions at best supports a finding reached on other grounds, and is by no means dispositive. Several statutes that contain such school lands and intoxicants provisions have been held *not* to effect any termination of reservation status.[11]

The legislative history:

The legislative history of the Flathead Act, as the district court noted, is "sparse" and "equivocal." The court

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[10]Act of March 3, 1909, ch. 263, 35 Stat. 781, 795-96.

[11]The Act of March 22, 1906, ch. 1126, 34 Stat. 80, contains an intoxicants provision (§ 13, added by Act of August 31, 1916, ch. 424, 39 Stat. 672), yet effected no termination. *Seymour v. Superintendent,* 368 U. S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962). The Act of February 14, 1913, ch. 54, 37 Stat. 675, contains a school lands provision (§ 7) and an intoxicants provision (§ 8), yet effected no termination. *United States v. Long Elk,* 565 F. 2d 1032 (8th Cir. 1977). The Act of May 29, 1908, ch. 218, 35 Stat. 460, contains a school lands provision (in § 1) and an intoxicants provision (added to § 8 by Act of February 17, 1910, ch. 40, 36 Stat. 196), yet effected no termination. *United States ex rel. Condon v. Erickson,* 478 F. 2d 684 (8th Cir. 1973). The Act of June 1, 1910, ch. 264, 36 Stat. 455, contains a school lands provision (§ 8) and an intoxicants provision (§ 13), yet effected no termination. *City of New Town v. United States,* 454 F. 2d 121 (8th Cir. 1972).

did, however, emphasize a change made at the behest of the Secretary of the Interior. In the earliest version of what eventually became the Act, section 8 spoke of giving certain Indians substitute lands "in the tract herein ceded." This was changed, in the statute finally enacted, to "in the tract under consideration" because, as the Secretary explained, the Tribes had not agreed to a cession and none was contemplated. The change strongly suggests congressional recognition that reservation lands were not being ceded, and hence that reservation status was not being terminated.

Polson urges us to assume that the Flathead Act expressed the same congressional policy and underlying purpose as three other statutes that were enacted within the same week to open all or part of three other reservations.[12] Two of these statutes have been held to terminate the reservation status of the areas involved.[13] This argument, however, overlooks salient differences between the Flathead Act and the other three statutes. All of the others purported to amend and ratify agreements previously negotiated with the affected Indians; they incorporated the text of those prior agreements; and they each contained explicit language of cession. The Flathead Act

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[12]The others are the Act of April 23, 1904, ch. 1484, 33 Stat. 254 [Rosebud Act]; Act of April 27, 1904, ch. 1620, 33 Stat. 319 [Devils Lake Act]; Act of April 27, 1904, ch. 1624, 33 Stat. 352 [Crow Act].

[13]The Rosebud Act terminated the reservation status of a portion of the Rosebud Sioux Reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). The Crow Act terminated a portion of the Crow Reservation. *Hawkins v. Crist*, No. CV 76-99-BLG (D. Mont. January 27, 1978).

does not purport to modify a prior cession agreement, since the Tribes had refused to make such an agreement. It contains no language of cession, but merely provides that after allotments to the Indians, the unallotted surplus "shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States." Flathead Act, § 8. Statutes couched in similar language have been held *not* to terminate reservation status.[14]

The surrounding circumstances:

Finally, Polson appeals to three "surrounding circumstances": the general federal policy prevailing at the time the Flathead Act was passed; negotiations that occurred a few years before its passage; and subsequent legislative and administrative actions. None of these does much to bolster Polson's position.

(1) Polson first argues that federal policy as of 1904 was to diminish and abolish existing reservations. Con-

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[14]The Act of June 17, 1892, ch. 120, 27 Stat. 52, declared the Klamath River Reservation "to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands." It did not terminate the reservation. *Mattz v. Arnett*, 412 U. S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). The Act of March 22, 1906, ch. 1126, § 3, 34 Stat. 80, provided that after classification and appraisal, the unallotted portion of the Colville Reservation "shall be open to settlement and entry under the provisions of the homestead laws." It did not terminate the reservation. *Seymour v. Superintendent*, 368 U. S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962). The Act of February 14, 1913, ch. 54, 37 Stat. 675, stated that the surplus land of the Standing Rock Reservation "shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry." It did not terminate any reservation land. *United States v. Long Elk*, 565 F. 2d 1032 (8th Cir. 1977).

sidered as a whole, however, the evidence Polson adduces establishes only a turn-of-the-century federal policy of allotting reservation land to the Indians in severalty and opening the surplus land to non-Indian settlement.[15] This is not the same as, nor does it imply, a policy of immediately terminating existing reservations. "Although the ultimate aim of the general policy of allotment was the abolition of Indian reservations, a reservation was not necessarily terminated or diminished by the first step of allotment and sale of surplus lands." *United States v. Southern Pacific Transportation Co.*, 543 F. 2d 676, 695 (9th Cir. 1976); *accord, Rosebud, supra*, 430 U. S. at 586-87, 97 S. Ct. at 1362-63; *DeCoteau v. District County Court*, 420 U. S. 425, 444, 95 S. Ct. 1082, 1092, 43 L. Ed. 2d 300 (1975).

Moreover, the existence of a general federal policy of ultimately abolishing reservations would do little to establish that the Flathead Act was specifically intended to terminate the Flathead Reservation. Many statutes contemporaneous with the Flathead Act, and thus presumably passed while the same overall policy was in force, have been held not to effect any termination.[16]

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[15]Polson's evidence for a policy of outright termination of reservations, as opposed to mere allotments and openings, is rather scanty. All of the more explicit declarations of hostility to the reservation system (contained in the 1889, 1890, 1891, and 1892 Reports of the Commissioner of Indian Affairs) were written by a single individual—Thomas J. Morgan, Commissioner of Indian Affairs under Benjamin Harrison (1889-93). After Harrison was succeeded by Grover Cleveland, the new Interior Secretary, Hoke Smith, expressed doubts about the previous administration's desire to dissolve the reservations as quickly as possible. See [1894] Sec'y of the Interior Annual Report III.

[16]Notes 11 and 14 *supra* cite a total of five such statutes enacted between 1892 and 1913.

(2) Polson next discusses the negotiations carried on with the Tribes between 1897 and 1901, pursuant to congressional authorization (Act of June 10, 1896, ch. 398, 29 Stat. 321, 341). These negotiations failed to induce the Tribes to cede a portion of their reservation to the United States. Polson argues, however, that the intent to terminate the reservation which Congress exhibited when it authorized the negotiations was subsequently carried out *unilaterally* in the Flathead Act.

This is an unjustified extension of the reasoning of *Rosebud, supra.* That case involved a 1904 statute that explicitly incorporated, and purported to amend and ratify, a 1901 cession agreement with the Rosebud Sioux tribe. The Court based its conclusion that Congress intended the 1904 statute to diminish the Rosebud Reservation on this explicit link to the prior cession agreement. By contrast, there was no prior cession agreement whatsoever for the Flathead Act to ratify, and it is mere speculation to suppose that Congress in 1904 must have intended to effect a termination simply because it had sought to negotiate one several years earlier.[17]

Indeed, the materials Polson cites reveal that the 1897-1901 negotiations aimed at results different from those subsequently achieved by the Flathead Act. The negotiations sought cession of *portions* of the Flathead Reserva-

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[17]Such speculation is impermissible since, as mentioned earlier, ambiguities must be resolved in the Indians' favor and the intent to terminate must be clear. *DeCoteau, supra,* 420 U. S. at 444, 95 S. Ct. at 1092. Moreover, an extension of *Rosebud* seems particularly ill-advised where, as here, what is at stake is termination of an entire reservation rather than, as in *Rosebud,* mere disminishment. *Rosebud, supra,* 430 U. S. at 599, n. 20, 616 n. 48, 97 S. Ct. at 1369 n. 20, 1377 n. 48.

tion.[18] The 1904 Act opened to settlement *all* unallotted reservation land, not merely a portion; it used no language of cession; and it provided for payment to the Indians of uncertain future proceeds from disposal of the affected lands, rather than a fixed sum, as contemplated in the earlier negotiations.[19] These differences make it difficult to be confident that Congress intended the 1904 Act to terminate the reservation.[20] Certainly we have been shown no statements by congressional proponents of the Flathead Act that the bill was designed to effect the termination Congress had sought to achieve by cession in the earlier negotiations.

(3) Finally, Polson seeks to support its claim that the Flathead Act was intended to terminate the reserva-

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[18]See Act of June 10, 1896, ch. 398, 29 Stat. 321, 341; Instructions to Commissioners from Acting Commissioner of Indian Affairs at 12 (Aug. 31, 1896) (Tribes "might be willing to enter into an agreement to cede a portion of their reserve"); Polson's Opening Brief at 18 (quoting 1899 Report of Flathead Indian Agent).

[19]The district court explained that until 1901 the negotiators repeatedly offered the Tribes "a lump sum price," although in their last offer they suggested the Indians sell the land themselves, with the government to purchase the unsold surplus after ten years.

The changed method of payment in the Flathead Act is not by itself proof that no termination was intended. *Rosebud, supra*, 430 U. S. at 598 n. 20, 97 S. Ct. at 1369 n. 20 (1977). It is, however, one factor pointing against termination. *DeCoteau, supra*, 420 U. S. at 448, 95 S. Ct. at 1094.

[20]For example, the 1892 statute opening the Klamath River Reservation to non-Indians had been preceded by more than a decade of unsuccessful congressional efforts to terminate the reservation. Yet the Supreme Court held that this history did not establish that the 1892 act embodied an intent to terminate, in view of the differences between the earlier proposals and the final act. *Mattz v. Arnett*, 412 U. S. 481, 499-504, 93 S. Ct. 2245, 2255, 37 L. Ed. 2d 92 (1973).

tion by looking at subsequent legislative and administrative action. Specifically, Polson points to three factors: the "jurisdictional history" of the Flathead Reservation after 1904; the pronouncements of Interior Department officials; and subsequent congressional legislation.

The "jurisdictional history" of disputed land—i. e., whether the state or the federal government exercised authority there—supported termination in *Rosebud, supra,* and *DeCoteau, supra.* In *Rosebud,* the state had apparently exercised jurisdiction over the lands in question ever since enactment of the relevant statutes. 430 U. S. at 603-04 & n. 27, 97 S. Ct. at 1371-72 & n. 27. In *DeCoteau,* the state exercised jurisdiction over the disputed lands until the federal Court of Appeals ruled otherwise. 420 U. S. at 449, 95 S. Ct. at 1095. The situation in the instant case is quite different. The Montana Supreme Court ruled thirty years ago that the state had no jurisdiction over major crimes on the Flathead Reservation. *State ex rel. Irvine v. District Court,* 125 Mont. 398, 239 P. 2d 272 (1951). Eight years ago the Montana Supreme Court held that the state had no jurisdiction over a civil dispute involving a commercial transaction between an Indian and a non-Indian "at Polson, Montana, located within the exterior boundaries of the Flathead Indian Reservation." *Security State Bank v. Pierre,* 162 Mont. 298, 511 P. 2d 325, 326 (1973). Thus the instant case simply does not involve the kind of unquestioned state assertion of author-

ity over the disputed lands that helped sway the Court in *Rosebud* and *DeCoteau*.[21]

Polson dwells at length on statements by officials of the Interior Department that indicate their belief that Flathead Reservation was terminated. The district court noted, however, that *both* sides adduced "innumerable documents from governmental agencies" that supported their conflicting positions. For example, there is the Presidential Proclamation that formally announced the opening of the reservation to non-Indian settlement. In *Rosebud, supra*, the Proclamation opening the land affected by the 1904 statute at issue there was accorded great weight: it contained emphatic language of cession which the Court called an "unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment." 430 U. S. at 602-03, 97 S. Ct. at 1371. The Proc-

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[21]Indeed, the Tribes list thirty-two published decisions of various courts that recognize the continued existence of the reservation. Polson responds that in most of these decisions the issue of reservation status was not relevant to the holding, while in the remaining ones reservation status was not disputed and the effect of the Flathead Act on that status was not considered. This response is irrelevant because the Tribes have not sought to invoke the doctrine of *stare decisis*. The repeated judicial recognition of the reservation's continued existence is simply evidence that the 1904 Act was not authoritatively treated as having terminated the reservation. As such it is a perfectly relevant piece of "jurisdictional history." In addition to the Montana Supreme Court holdings described above, the most persuasive opinion, considered as evidence of how the reservation's status was viewed, is *Moe v. Confederated Salish & Kootenai Tribes*, 425 U. S. 463, 466-67, 96 S. Ct. 1634, 1638, 48 L. Ed. 2d 96 (1976), where the Supreme Court described the Flathead Reservation as having its 1855 boundaries.

lamation opening the Flathead Reservation, by contrast, contains no such statement.[22] Indeed, section 1 of the Proclamation speaks of would-be settlers submitting applications "for lands in any or all of said Reservations"—*not* "former Reservations"—and there are similar references in sections 5 and 8. This seems to manifest a contemporary perception that the reservation had not been terminated.

The Tribes enumerate other administrative acts and statements that contradict those adduced by Polson and indicate a perception of Flathead Reservation as still in existence. Actions and utterances of federal officers that manifest no single clear perception of the reservation's status can hardly be treated as a significant item in determining that status. *See City of New Town v. United States*, 454 F. 2d 121, 125-26 (8th Cir. 1972).

Finally, Polson refers to congressional actions after 1904—such as bills that referred to the "former" Flathead Reservation—as demonstrating that Congress believed the reservation to have been terminated. Such evidence of legislative intent is at best dubious, however: though "not always without significance," "subsequent legislation usually is not entitled to much weight in con-

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[22]The Proclamation begins:

> I, William Howard Taft, President . . . do hereby prescribe, proclaim and make known that all the nonmineral, unreserved lands classified as agricultural lands of the first class, agricultural lands of the second class and grazing lands within the Flathead Indian Reservation . . . shall be disposed of under the provisions of the homestead laws of the United States . . . and be opened to settlement and entry in the following manner . . . .

Proclamation of May 22, 1909, 36 Stat. 2494.

struing earlier statutes." *Mattz v. Arnett*, 412 U.S. 481, 505 n. 25, 93 S. Ct. 2245, 2258 n. 25, 37 L. Ed. 2d 92 (1973). Moreover, the Tribes list *seventy-two* statutes enacted between 1905 and 1949 that refer to the Flathead Reservation as still existing, rather than as a "former" reservation. Polson's response—that all of these references "were nothing more than convenient geographical designations" —is unconvincing.[23] Polson has cited only *two* statutes that refer to the "former" reservation,[24] plus a third that refers (admittedly incorrectly) to the "ceded lands" of the reservation.[25] The other congressional materials it cites are unsuccessful bills.

In summary, neither the post-1904 "jurisdictional history" of Flathead Reservation nor subsequent congressional and administrative statements and actions demonstrate that Congress intended the 1904 Flathead Act to terminate the reservation.

Since neither the Act on its face nor the surrounding circumstances and legislative history make it clear that Congress intended to terminate the Flathead Reservation, we affirm the district court's finding that there has been no such termination.

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[23]Polson also argues that many of the statutes the Tribes cite were enacted either before May 1910, when the Flathead Reservation opening took effect, or after restorations of land to reservation status pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, the first of which occurred in 1936. Even if this argument is valid,there are still thirty-eight statutes that refer to the Flathead Reservation as existing and yet were enacted during the period when, according to Polson, that reservation had been terminated.

[24]Act of July 17, 1914, ch. 143, 38 Stat. 510; Act of February 14, 1920, ch. 75, 41 Stat. 408, 421.

[25]Act of May 31, 1906, ch. 2567, 34 Stat. 205.

THE OWNERSHIP ISSUE

This circuit decided the ownership issue forty years ago, ruling that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the Tribes. *Montana Power Co. v. Rochester*, 127 F. 2d 189, 191 (9th Cir. 1942). Other courts over the years have agreed. *See, e.g., Montana Power Co. v. FPC*, 459 F. 2d 863, 865 (D. C. Cir.), *cert. denied*, 408 U. S. 930, 92 S. Ct. 2497, 33 L. Ed. 2d 343 (1972). The *Rochester* holding was explicitly endorsed by the district court in *United States v. Pollmann*, 364 F. Supp. 995, 999 (D. Mont. 1973), over the objection that *United States v. Holt State Bank*, 270 U. S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926), dictates a contrary conclusion—an objection which the appellees renew here. It was again endorsed by the district court in *Namen 1*, 380 F. Supp. at 457.

[5] Our *Rochester* holding is thus strongly supported by *stare decisis*. That doctrine applies with special force to decisions affecting title to land. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 381, 97 S. Ct. 582, 592, 50 L. Ed. 2d 550 (1977); *United States v. Title Insurance & Trust Co.*, 265 U. S. 472, 486-87, 44 S. Ct. 621, 623, 68 L. Ed. 1110 (1924). The reason for this is the special reliance that these decisions command—they "become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co. v. National Co.*, 3 Wall. 332, 70 U. S. 332, 334, 18 L. Ed. 42 (1866).

Such reliance has in fact been placed on the "rule" that the bed of the south half of Flathead Lake is beneficially owned by the Tribes. Hydroelectric power devel-

opment on the Flathead Reservation has proceeded for half a century on the assumption that the Tribes own the south half of the lake. The Kerr hydroelectric project was constructed on reservation land pursuant to a license issued in 1930. The rental payments which the project's owner (now the Montana Power Company) has been required to make have included substantial sums, aggregating several million dollars for use of the south half of the lake.[25]

Appellees nevertheless contend that *Rochester* is no longer good law in light of *Montana v. United States*, 450 U. S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). In *Montana*, the Supreme Court held that the treaty establishing the Crow Indian Reservation had not conveyed to the Indians beneficial ownership of the bed of the Big Horn River, which flows through the reservation. Instead, title to the river bed had "passed to the State of

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[25]Appellees seek to minimize the significance of the lake bed as a factor in these rental payments, arguing that most of the revenue the Tribes have received for the Kerr Dam site is compensation for the value of the power site itself, rather than for the use of the lake bed.

Nevertheless, the Tribes have received substantial revenue from their lakebed interest. In *Montana Power Co. v. FPC*, 459 F. 2d 863, 871, 72 (D. C. Cir.) *cert. denied*, 408 U. S. 930, 92 S. Ct. 2497, 33 L. Ed. 2d 343 (1972), Montana Power was required to pay the Tribes an annual rent of $950,000, or 42.13% of the value of the Kerr project. In computing that figure, the FPC had assigned 8% of the project's value to the Tribes as rent for the lake bed. That means that 18% (8/42.13) of the annual rental payments, or $171,000, was rent for the lake bed. This is not an inconsiderable sum, and since these payments were made from 1959 through 1974, they added up to well over $2.5 million. Since 1975, the annual rent to the Tribes has been $2.6 million. If the lake bed rental makes up the same proportion of these current rents, then ownership of the south half of the lake is now worth $468,000 per year to the Tribes.

Montana upon its admission into the *Union.*" *Id.* 101 S. Ct. at 1254. Appellees contend that the *Montana* holding is controlling here and compels the conclusion that, contrary to this court's decision in *Rochester*, the Hell Gate Treaty did not convey beneficial ownership of the south half of Flathead Lake to the Tribes. We do not agree.

[6] In *Montana*, the Supreme Court emphasized that although the United States has the power to convey lands under a navigable waterway in a territory, thus defeating the title of the future state, there is a "strong presumption" against such a conveyance. 101 S. Ct. at 1251.[17] The

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[17]The *Montana* Court emphasized that "Congress was, of course, aware of this presumption once it was established by this Court." 101 S. Ct. at 1251 n. 2. There is no evidence, however, that the presumption against pre-statehood federal grants of land under navigable waters had been established at the time the Hell Gate treaty was negotiated and ratified. The earliest statement of the presumption appeared seven decades later: "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U. S. 49, 55, 46 S. Ct. 197, 199, 70 L. Ed. 465 (1926).

Earlier cases that appellees cite do not articulate any presumption concerning federal grants of land under navigable waters *before* a state is admitted to the Union. That presumption is said to flow from the "equal footing doctrine"—that new states enter the Union on an equal footing with the original states, all of which entered the Union owning the land under navigable waters within their borders. But *Pollard's Lessee v. Hagan*, 44 U. S. (3 How.) 212, 11 L. Ed. 565 (1845), generally regarded as the source of the equal footing doctrine, dealt with a purported federal grant of land years *after* Alabama had been admitted to the Union. And *Martin v. Waddell*, 41 U. S. (16 Pet.) 367, 10 L. Ed. 997 (1842), cited for the proposition that ownership of the land under navigable waters is an incident of sovereignty, involved land in one of the original thirteen states. The case required "clear and especial words" in a patent by the

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Court held that the 1868 treaty with the Crow Tribe contained no language strong enough to overcome this presumption: "The treaty is no way expressly referred to the riverbed, . . . , nor was an intention to convey the riverbed expressed in 'clear and special words,' . . . , or 'definitely declared or otherwise made plain.'" *Id.* at 1252 (citations omitted).

[7] By contrast, the Hell Gate Treaty *did* expressly refer to Flathead Lake—in fact, it referred to the lake in defining the boundaries of the reservation. The northern boundary was to run from "a point due west from the point halfway in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide . . . ." Treaty of July 16, 1855, 12 Stat. 975, Article II. It would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians.[28] Certainly the most natural and intelli-

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English Crown to a private individual because such a patent would transform a portion of the public domain into the individual's private property. *Id.* at 411. The requirement was explicitly characterized as dictum. *Id.* Moreover, the underlying rationale for this requirement is of doubtful relevance to a reservation of land by a sovereign Indian tribe. Such a reservation does not, properly speaking, involve a "grant" of public land. *See Confederated Salish and Kootenai Tribes v. United States,* 437 F. 2d 458, 468 n. 29 (Ct. Cl. 1971). Nor does it convert public domain into an individual's private property.

[28]Had Congress intended *not* to convey the southern half of the lake to the Indians, it could easily have defined the Reservation's northern boundary, upon reaching the west shore of the lake, as running along the shore of the southern half of Flathead Lake.

gible way of understanding the boundary description is to infer an intent to convey the southern lake bed. This natural interpretation should be adopted, in view of the Supreme Court's very frequent admonitions that doubtful language in Indian treaties must be construed in favor of the Indians and given the sense the Indians would have understood it to convey. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U. S. 658, 675-76, 99 S. Ct. 3055, 3069-70, 61 L. Ed. 2d 823 (1979); *DeCoteau v. District County Court,* 420 U. S. 425, 444, 95 S. Ct. 1082, 1092, 43 L. Ed. 2d 300 (1975); *Antoine v. Washington,* 420 U. S. 194, 199-200, 95 S. Ct. 944, 948, 43 L. Ed. 2d 129 (1975); *McClanahan v. Arizona State Tax Comm'n,* 411 U. S. 164, 174, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129 (1973); *Choctaw Nation v. Oklahoma,* 397 U. S. 620, 630-31, 90 S. Ct. 1328, 1334, 25 L. Ed. 2d 615 (1970).[29]

There is a further distinction between *Montana* and the instant case. The *Montana* Court supported its conclusion—that title to the bed of the Big Horn River had not been granted to the Crow Tribe—by reasoning that "the situation of the Crow Indians at the time of the treaties presented no 'public exigency' which would have required" a departure from the federal policy of reserving

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[29] *Montana,* to be sure, established that this rule of construction favoring the Indians does not mean that the countervailing presumption against federal grants of land under navigable waters in the territories is nullified whenever Indian reservations are involved. 101 S. Ct. at 1265 (Stevens, J., concurring). Yet the pro-Indian rule of construction should certainly weaken that presumption—especially where, as here, the controlling treaty was negotiated and ratified long before the presumption crystallized. See note 27 *supra.*

ownership of the land under navigable waters for the future states. 101 S. Ct. at 1253. No exigency existed because "fishing was not important to [the Crows'] diet or way of life." *Id.* By contrast, the Kootenai Indians, one of the Tribes, depended heavily on fishing. Moreover, the urgency with which the Office of Indian Affairs pressed the dilatory Senate to ratify the Hell Gate and related treaties demonstrates that securing the Indians' assent to the opening of large areas of the then Washington Territory to American settlement was perceived as a "public exigency" in the 1850's.

Thus both the language of the treaty involved in this case and the circumstances surrounding its negotiation differ from what was found decisive in *Montana v. United States, supra.* Given the factors, discussed above, that entitle the *Rochester* holding to more than usual precedential force, we adhere to that holding and affirm that the bed of the south half of Flathead Lake is owned by the United States in trust for the Tribes.

THE REGULATORY ISSUE

[8] The district court concluded that the Tribes had no power to regulate the federal common law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The court's rationale was that "Indian tribes no longer retain those sovereign powers the exercise of which is inconsistent with their dependent status," namely "those which involve the relations between an Indian tribe and the non-members of the tribe," and hence that the opening of the reservation to

settlement by non-Indians had "implicitly divested" the Tribes of regulatory authority over non-Indians.

This rationale was derived from two Supreme Court cases decided in March 1978: *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978), and *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978). In *Oliphant,* the Supreme Court acknowledged that "Indian tribes do retain elements of 'quasi-sovereign' authority," but explained that "the tribe's retained powers are not . . . limited only by specific restrictions in treaties or congressional enactments. . . . [T]ribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'" Id.* at 208 (citation omitted) (emphasis in original). In *Wheeler,* the Court added that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." 435 U.S. at 326, 98 S.Ct. at 1087.

Two years later the Supreme Court appeared to recede from the *Oliphant/Wheeler* view that a tribe's dependent status works an "implicit divestiture" of certain tribal powers. The Court said: "Tribal powers are not implicitly divested by virtue of the tribes' dependent status." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed. 2d 10 (1980). Rather, divestiture is found "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the

National Government." *Id.* Nine months later, however, in *Montana v. United States,* 450 U. S. 544, 101 S. Ct. 1245, 1257, 67 L. Ed. 2d 493 (1981), the Court cited *Wheeler* approvingly for its statement that the dependent status of Indian tribes had implicitly divested them of powers over relations with non-Indians, and said that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation."

It is not clear whether the *Montana* rule (divestiture of powers not needed for tribal self-government or internal control) is meant to supersede that of *Colville* (divestiture of powers inimical to overriding federal interests). *Montana* nowhere explicitly rejects *Colville* or acknowledges the apparent tension between the criteria employed in the two cases. Moreover, the *Montana* Court drew its rule from *Wheeler* and *Oliphant,* where the Court used "overriding federal interests" reasoning to explain why divestiture should occur: "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained *so as not to conflict with the interests of this overriding sovereignty.*" *Oliphant, supra,* 435 U. S. at 209, 98 S. Ct. at 1021 (emphasis added).

If the *Colville* rule—divestiture of only those powers inconsistent with overriding federal interests—is applied in the instant case, the Tribes must prevail on the regulatory issue, because no significant federal interests would

be impaired by tribal regulation of the riparian rights of non-Indian landowners on the Flathead Reservation.[30] Indeed, the United States itself entered this lawsuit on the side of the Tribes, contending not only that no federal interest would be injured by the challenged tribal regulation but that the regulation would in fact advance federal anti-pollution efforts. The challenged ordinance was approved by the Secretary of the Interior in July 1977: the Secretary's letter commends the Tribes' action and "fully endorses the motivation behind the creation of the Ordinance."

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[30]Appellees suggest two such interests: preventing intrusions on the non-Indians' personal liberties, and fulfilling the "justifiable expectations" of the non-Indians. The first alleged interest is too broad and vague—it would seem to rule out *any* exercise by Indians of civil or regulatory jurisdiction over non-Indians, yet some such exercises have been approved. *See, e. g., Colville, supra* (Indians can tax cigarette sales to non-Indians on the reservation); *Williams v. Lee*, 358 U. S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) (tribal courts have exclusive jurisdiction over non-Indian's action for money for goods sold to Indians on the reservation). The second asserted interest—protecting non-Indians' expectations—also seems weak. It may well be that non-Indians who acquired land inside the reservation never expected to be subjected to regulation by the Indians. But likewise the Indians themselves never expected, when the Hell Gate Treaty set aside the Flathead Reservation "for the[ir] exclusive use and benefit" and barred non-Indians from living there without Indian assent, that reservation land opened without their consent to non-Indians would be removed from their jurisdiction. The Indians expectations rest on the explicit guarantees of a treaty signed by the President and Secretary of State and ratified by the Senate. The non-Indians' expectations rest not on explicit statutory language, but on what is presumed to have been the intent underlying the allotment acts—a policy of destroying tribal government to assimilate the Indians into American society. It is difficult to see why there should be an overriding federal interest in vindicating only the latter expectations—especially when the anti-tribal policy on which they rest was repudiated over fifty years ago. *See Mattz v. Arnett*, 412 U. S. 481, 496 n. 18, 93 S. Ct. 2245, 2254 n. 18, 37 L. Ed. 2d 92 (1973); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 151-52, 93 S. Ct. 1267, 1271-72, 36 L. Ed. 2d 114 (1973).

Even if the *Montana* rule—divestiture of all powers not necessary "to protect tribal self-government or to control internal relations"—is applied to the instant case, we believe that the Tribes should prevail on the regulatory issue. We reach this conclusion for two distinct reasons.

First, the *Montana* Court explicitly affirmed this circuit's holding that the Crow Tribe had the power to "prohibit non-members from hunting or fishing on land belonging to the Tribe *or held by the United States in trust for the Tribe,*" or to regulate such hunting and fishing if it permitted those activities. 101 S. Ct. at 1254 (emphasis added). In the instant case, the Tribes are in effect seeking to regulate non-Indians' use of tribal trust land, since the exercise by appellees of their riparian rights entails building wharves, breakwaters, and other structures out onto the bed and banks of the south half of Flathead Lake.

Second, the *Montana* Court acknowledged certain exceptions to the general rule that tribes were divested of powers not necessary for self-government or internal relations. In particular, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 101 S. Ct. at 1258. The conduct that the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty

fishing rights, or otherwise harm the lake, which is one of the most important tribal resources. Hence the challenged ordinance falls squarely within the exception recognized in *Montana*.[31]

For the reasons just discussed, we reverse the judgment of the district court on the regulatory issue and hold that the Tribes have the authority to apply Ordinance 64A to regulate the riparian rights of non-Indians owning land within the Flathead Reservation.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[31]Appellees, in addition to arguing that the Tribes have lost their inherent sovereign power to regulate non-Indians' use of tribal land, also argue that Ordinance 64A violates the due process and equal protection guarantees of the fifth amendment because it was enacted by a jurisdiction in which they, as non-Indians, have no participation.

The general rule, however, is that the Bill of Rights cannot be invoked against tribal actions unless Congress has explicitly so provided. *See Talton v. Mayes*, 163 U. S. 376, 16 S. Ct. 986, 41 L. Ed. 196 (1896); *Groundhog v. Keeler*, 442 F. 2d 674, 678 (10th Cir. 1971); *Martinez v. Southern Ute Tribe*, 249 F. 2d 915, 919 (10th Cir. 1957), *cert. denied*, 356 U. S. 960, 78 S. Ct. 998, 2 L. Ed. 2d 1067 (1958). Congress in 1968 did impose most provisions of the Bill of Rights—including due process and equal protection—on Indian tribes by the Indian Civil Rights Act, 25 U. S. C. §§ 1301-41. But the Supreme Court held in *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), that habeas corpus is the exclusive remedy by which enforcement of that Act can be obtained in federal court. Hence appellees cannot raise their fifth amendment claims here.

Moreover, in *United States v. Mazurie*, 419 U. S. 544, 557, 95 S. Ct. 710, 717, 42 L. Ed. 2d 706 (1975), the Court rejected the argument that an Indian tribe cannot subject non-members to tribal ordinances. It is true that in *Mazurie* the power to enact the ordinance was delegated by Congress, whereas in the instant case the power is an inherent component of the limited sovereignty enjoyed by the Tribes. But the source of the power is not relevant in considering appellees' argument that the fact that they do not belong to the Tribes is in itself sufficient to make it unconstitutional to apply Ordinance 64A to them.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-3189, 80-3190, 80-3196, 80-3216, 80-3274

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,

Appellants/Cross-Appellees,

v.

JAMES M. NAMEN, et al., CITY OF POLSON, MONTANA, and STATE OF MONTANA,

Appellees/Cross-Appellants.

ORDER

(Filed March 10, 1982)

Before: PREGERSON and POOLE, Circuit Judges, and KELLAM,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Pregerson and Poole have voted to reject the suggestion for rehearing en banc, and Judge Kellam recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil No. 2343
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,
Plaintiffs and Counterclaim Defendants,
and
UNITED STATES,
Intervenor-Plaintiff,
vs.
JAMES M. NAMEN, et al.,
Defendants,
and
CITY OF POLSON, MONTANA,
Intervenor-Defendant and Counterclaim Plaintiff.

Civil No. 75-143-M
CITY OF POLSON, MONTANA,
Plaintiff,
and
STATE OF MONTANA,
Intervenor-Plaintiff,
vs.
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,
Defendant.

Civil No. 77-70-M
UNITED STATES,
Plaintiff,
vs.
CITY OF POLSON, and THE STATE OF MONTANA,
Defendants.

Opinion

(Filed April 8, 1980)

Three related cases were consolidated for trial: (1) *Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al (Tribes) v. James M. Namen, et al.*, with the *United States* as intervenor-plaintiff and *City of Polson, Montana* as Intervenor-defendant, No. CV-2343; (2) *City of Polson, Montana v. Tribes*, with *State of Montana* as intervenor-plaintiff, No. CV-75-143-M; and (3) *United States v. City of Polson and State of Montana*, No. 77-70-M.

Procedural Background

The Tribes and chairman of the Tribal Council filed suit in August, 1973, seeking declaratory and injunctive relief against James M. Namen and members of his family, who are the owners of land located in Polson, Montana on the South Half of Flathead Lake, which is a part of the Flathead Indian Reservation. They were the successors in interest to an Indian allottee who, pursuant to the Flathead Allotment Act of 1904 (33 Stat. 302), obtained from the United States a patent in fee covering the lakeside property. The Tribes sought (1) a declaration that the Namens were trespassing upon the Tribes' land to the extent that they had maintained and erected buildings and structures beyond the high water mark of Flathead Lake and encroached on the bed and banks of the Lake; and (2) an injunction against further trespass and an order directing the Namens to immediately remove all buildings and structures, including landfills, that extended beyond the high water mark and that the lands

below the high mark be restored to their original condition. The City of Polson also is the owner of land fronting on the South Half of Flathead Lake, which it has developed for recreational purposes, and has levied taxes against the Namens' structures. The City was permitted to intervene as a defendant.

The court concluded that federal common law rather than state or tribal law controlled the determination of the Namens' rights, that the Namens and City of Polson as owners of lands riparian to the South Half of Flathead Lake were entitled to access to the lake, and that concomitant with that right of access was the right to wharf out to navigable water. The court left for later determination the question of whether any of the structures owned and maintained by the Namens or the City of Polson constituted an abuse of their riparian rights. *Confederated Salish and Kootenai Tribes v. Namen,* 380 F. Supp. 452, 466-67 (D. Mont. 1974) (*Namen I*). In a per curiam opinion, the court of appeals affirmed and adopted the district court's opinion. *Confederated Salish and Kootenai Tribes v. Namen,* 534 F. 2d 1376 (9 Cir.), *cert. denied,* 429 U. S. 929 (1976).

In November, 1975, the City of Polson brought suit against the Tribes (No. CV-75-143-M) seeking declaratory judgment that the Flathead Indian Reservation had been *pro-tanto* disestablished and diminished to the extent that reservation lands had been alienated in fee to non-tribal persons or entities or to Indian allottees, that the City of Polson was no longer within the boundaries of the Flathead Indian Reservation, and that the Tribes no longer had jurisdiction, civil, criminal, or governmental, within the boundaries of the City of Polson. In June, 1976, the

City of Polson amended its complaint seeking a further declaration that the Tribes had no property rights or interests in and to the streets, alleys, and public reserves included within the plat of the original town site of the City of Polson. The State of Montana intervened as a plaintiff. In June, 1977, the two causes, CV-2343 and CV-75-143-M were consolidated. The United States later intervened as a plaintiff in CV-2343.

In September, 1977, the Tribes filed a second amended complaint in No. CV-2343 asking the court to enjoin defendants from trespassing upon the Tribes' land. They sought declarations; (1) that the defendants were in trespass "to the extent that they maintain and have erected buildings and structures beyond the high water mark of elevation 2893.2 feet of Flathead Lake"; (2) that defendants were in trespass to the extent that defendants' buildings and structures (a) were more extensive in size than was permissible under federal common law, or was necessary to gain access to Flathead Lake, (b) were not of the type of structure permitted under federal common law, or (c) interfered with navigation on the South Half of Flathead Lake; (3) that by maintaining the buildings and structures, defendants were "interfering with plaintiffs' treaty fishing rights and with the boating and fishing rights of plaintiffs' permittees"; (4) that defendants were aiding and abetting non-tribal members in the unauthorized use of tribal resources by permitting non-tribal members to use defendants' buildings and structures for pleasure boating and fishing in violation of tribal ordinances; (5) that defendants' buildings and structures were used "in such a manner as to degrade the water quality of the South Half of Flathead Lake" to the detriment of the

Tribes' fishing rights and their right to have the Lake "maintained in the pristine state it possessed at the time of the Treaty of Hell Gate"; (6) that the extent of the scope and size of defendants' buildings and structures, and the uses made of them, be limited to "the riparian uses, if any, made of the lands involved at the times the lands went from trust to fee status"; and (7) that the defendants' buildings and structures and the uses made of them contravene applicable federal statutes and regulations.

The City of Polson, intervenor-defendant, answered plaintiffs' amended complaint and as a counterclaim included the declaratory requests of its amended complaint in No. CV-75-143-M, *supra*, and requested a further declaration that the Tribes had no property rights in any of the lands underlying the navigable waters of the Flathead Lake which the City of Polson would otherwise own. In reply to Polson's counterclaim, the Tribes asserted defenses of lack of subject matter jurisdiction; immunity from suit absent a waiver of immunity by the United States and consent by the Tribes; failure to name an indispensable party, the United States, which had not consented to suit; failure to state a claim for relief; lack of a justiciable case or controversy; and *res judicata* based upon *Namen I* and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

In December, 1977, the United States filed a separate suit against the City of Polson and the State of Montana (No. 77-70-M), seeking a declaratory judgment that the Act of April 23, 1904, 33 Stat. 302 (Flathead Indian Allotment Act), did not disestablish the boundaries of the Flathead Indian Reservation as established by the Treaty of Hell Gate, 12 Stat. 975 (July 16, 1855), and that the

Confederated Salish and Kootenai Tribes have the authority to enact and enforce regulations concerning the use of the bed and banks of that portion of Flathead Lake within the boundaries of the Flathead Indian Reservation. The court ordered this case consolidated with CV-2343 and CV-75-143-M.

The Tribes and the United States made motions for summary judgment on the following issues: (1) ownership of the bed and banks of the South Half of Flathead Lake; (2) disestablishment and diminishment of the Flathead Indian Reservation; and (3) the right to regulate riparian development of the South Half of Flathead Lake.

The Tribes also filed a motion for summary judgment on Counts I, II, III, V, VI, VII and VIII of their second amended complaint. The Namens and State of Montana made a similar motion, but later withdrew it and filed a motion to dismiss under Rule 41(b), F.R.Civ.P.

The Tribes moved to dismiss without prejudice Count IV of their second amended complaint, which alleges that the Namens have aided and abetted non-tribal members in the unauthorized use of tribal resources to the extent that the Namens rent boats for pleasure boating or fishing to non-tribal members for use on the South Half of Flathead Lake without a tribal permit. The Namens and State of Montana resist voluntary dismissal of this count and argue that it should be dismissed with prejudice.

In an unpublished memorandum of decision filed on September 20, 1979,[1] this court adhered to all of its con-

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[1]This opinion will incorporate a substantial part of the memorandum decision, with some deletions and revisions, with respect to the issues decided in the memorandum, and will then set out the court's conclusions with respect to the issues reserved in the memorandum.

clusions in *Namen I* and concluded further that (1) there has been no diminishment or disestablishment of the Flathead Reservation, and (2) the Tribes do not have the authority to regulate the riparian rights of the Namens, City of Polson, and State of Montana. The Tribes' motions for summary judgment with respect to the ownership of the beds and banks of the South Half of Flathead Lake and the disestablishment and diminishment of the Flathead Reservation were granted. Their motion with respect to the right to regulate riparian rights of non-Indians on the South Half of Flathead Lake and their motion for summary judgment on Counts I, II, III, V, VI, VII and VIII of their second amended complaint were denied. Ruling on the motion to dismiss Count IV was reserved.

Present Procedural Status of Remaining Issues

When the memorandum of September 20, 1979, was entered, the case (as noted in the memorandum) presented an anomalous procedural situation. Following extensive discovery, the three consolidated cases were set for trial on June 6, 1978. Before trial cross-motions for summary judgment were filed by the Tribes and Namens, the latter filing their motion on the day of trial. Well in advance of trial counsel for the Tribes had advised opposing counsel and the court that they did not intend to present any live testimony. At the outset of the trial counsel for both the Tribes and the United States again stated that they would not present "the testimony of any live witnesses".

Counsel for Namens, State of Montana, and City of Polson then made a motion, pursuant to Rule 41(b), F.R.Civ.P., to dismiss Counts II, III, IV, V, VI and VII

of the Tribes' complaint and Counts II, III, IV and V of the Government's complaint in intervention for failure of the Tribes and the United States to sustain their burden of proof. The court, for the time being, denied the motions, stating that if any evidence were to be submitted, it should be presented at that time. Counsel for the Namens, State of Montana, and City of Polson then informed the court that they would present no live witnesses and renewed their motions to dismiss under Rule 41(b).[2]

In a brief filed subsequent to the trial, the Tribes contend that under 25 U.S.C. § 194 (1976 Ed.) the defendants had the burden of proof on the issue raised in Counts I, II, III, V, VI, VII, and VIII of the Tribes' second amended complaint; that the defendants had not carried their burden of proof, and the Tribes' motion for summary judgment accordingly should be granted. In support of this contention the Tribes relied on *Omaha Indian Tribes Treaty of 1854, etc. v. Wilson*, 575 F. 2d 620, 632-633 (8 Cir. 1978). Subsequently the Supreme Court granted certiorari. This court then decided to defer disposition of this case pending the decision of the Supreme Court in *Wilson*. After *Wilson* was decided on June 20, 1979 (*Wilson v. Omaha Indian Tribe*, — U.S. —, 99 S.Ct. 2529), counsel filed supplemental briefs with respect to the effect of the decision of the Supreme Court in *Wilson*, and the decision of the Court of Appeals for

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[2]Subsequent to the trial, Namens withdrew their motion for summary judgment, explaining in a post trial brief that "it became evident that this was not the proper procedural predicate upon which to attack the sufficiency of the Plaintiffs' case", and accordingly "the Defendants chose to stand on their Rule 41 (b) motions".

the Ninth Circuit in *United States v. State of Montana*, 604 F. 2d 1162 (opinion filed June 12, 1979, and modified on denial of rehearing on September 20, 1979).

In an order entered on August 3, 1979, the court requested counsel to advise the court whether, in the light of developments since the trial on June 6, 1978, they desired to offer any further evidence. All parties responded that they did not desire any further evidentiary hearing. The Namens and State of Montana, however, stated that they would file supplemental affidavits in opposition to the Tribes' motion for summary judgment. On August 22, 1979, counsel for Namens and the State of Montana filed a supplemental affidavit of James M. Namen and on August 23, 1979, filed an affidavit of Robert E. Schumacher, an employee of Montana Fish, Wildlife and Parks. Counsel for the Tribes objected to the consideration of both amendments.

After considering the effect of the pending motions for summary judgment and the motion to dismiss under Rule 41(b), the court concluded to rule on the respective motions and set the case for further trial, particularly in view of the affidavits filed by Namens and Montana, and the Tribes' objection to their consideration.[3] The case was set for further hearing on February 19, 1980.

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[3]The court took final action on the motions for summary judgment, noting that the Tribes would have an opportunity to present additional evidence at a continuation of the trial. Noting also that the Rule 41 (b) motions of Namen, Montana, and Polson may be made "only after the plaintiff has completed the presentation of his evidence", a ruling on these motions was deferred "until the Tribes have closed their case, either through the submission of additional evidence or a determination that no further evidence will be presented".

Subsequently the Tribes and the United States agreed that the supplemental affidavit of James M. Namen and the affidavit of Robert E. Schumacher, may be received in evidence; and all parties then advised the court that they would offer no further evidence. The hearing set for February 19, 1980 accordingly was cancelled, and the case was deemed submitted for final disposition.

Counsel were granted further time to serve and file supplemental briefs with respect to (a) the effect of the Federal Water Pollution Control Act and regulations pursuant thereto; (b) the burden of proof under 25 U. S. C. § 194; (c) proof of alleged violations of riparian rights; and (d) any other matters counsel deemed necessary in the final dispositions of the remaining issues. All supplemental briefs have now been filed.

I. Conclusions in Namen I

This court concluded in *Namen I* that:

(1) The land within the original boundary of the Flathead Indian Reservation, including the South Half of Flathead Lake, is still part of the Reservation; (2) the United States holds the bed and banks of the South Half of Flathead Lake below high water mark in trust for the Tribes; (3) Namens have erected and maintained buildings and structures which extend beyond high water mark and encroach on the beds and banks of Flathead Lake; (4) the fee patents issued to Namens' predecessors, City of Polson, and others under the Flathead Allotment Act and Villa Sites Act, include the customary riparian rights of access and wharfage; (5) federal common law principles of riparian rights are applicable and control those access

and wharfage rights; and (6) the Tribes' right to the "exclusive use and benefit" of the Reservation has been sharply limited by the allotment of its lands to individual Indians, the sale of allotted lands to non-Indians, and the massive settlement of surplus unallotted lands by non-Indians.

In these proceedings the parties have questioned portions of the holdings in *Namen I.* The court has considered all of their contentions, and, as set forth *infra*, adheres to all of the findings and conclusions in *Namen I.*

II. Ownership of the Bed and Banks of Flathead Lake

The Namens and City of Polson, defendants in the Namen case, and State of Montana contend that as riparian landowners the Namens and City of Polson own to the low water mark and that the State of Montana owns the bed of the lake below the low water mark. They argue that (1) under rules of patent construction, the patent given by the United States to defendants' predecessors in interest granted title to the low water mark of the lake; and (2) the "equal footing" doctrine requires the conclusion that the State of Montana acceded to ownership of the bed of the lake upon achieving statehood, despite any treaty to the contrary.

In 1942, however, the Ninth Circuit Court of Appeals held that a fee patent to allotted land bordering on that portion of Flathead Lake within the Flathead Indian Reservation conveyed title to the high water mark only, and that title below that mark and beneath the lake is in the United States in trust for the Confederated Tribes. *Montana Power Co. v. Rochester,* 127 F. 2d 189, 191 (9 Cir. 1942). This court has consistently followed *Rochester.*

See *Confederated Sa'ish and Kootenai Tribes v. Namen (Namen I)*, *supra; United States v. Pollmann*, 364 F. Supp. 995, 998-99 (D. Mont. 1973), and cases cited therein. *Accord, Montana Power Co. v. F. P. C.*, 148 U. S. App. D. C. 74, 459 F. 2d 863, 865, *cert. denied*, 408 U. S. 930 (1972).

In spite of the holding in *Namen I*, the Namens, Polson, and Montana still argue that *Rochester* is not controlling because (1) the Rochester court was not cited to *United States v. Holt State Bank*, 270 U. S. 49 (1926), a case concerning patent construction, and (2) *Rochester* did not address the "equal footing" doctrine and preceded that doctrine's most recent reaffirmation in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977).

Although *Holt State Bank* was not cited in *Rochester*, it was extant at the time of the *Rochester* decision, having been decided 16 years earlier. Moreover, this court in *Pollmann, supra*, found *Holt State Bank* distinguishable because *"Ho't* did not involve the express treaty provisions which *Rochester* found determinative . . ." 364 F. Supp. at 999.

In an unpublished memorandum of June 22, 1977, this court concluded that the "equal footing" doctrine could not have abrogated the treaty provisions construed in *Rochester* because the Hell Gate Treaty was made before Montana became a state. It is a part of the equal footing doctrine that a state takes sovereignty over public lands in the condition of ownership at the time it attains statehood. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 87-88 (1922). It is true that *Corvallis* reaffirmed and clarified the equal footing doctrine, but it did not appear to this court that *Corvallis* affected the question resolved

in *Rochester, i. e.*, whether the United States reserved title to the Flathead Lake before the lands passed to Montana under the doctrine. See *Shively v. Bowlby*, 152 U. S. 1, 48 (1894).

Namens et al. contend, however, that this court misconstrued the effect and importance of *Corvallis* in determining whether title to the bed and banks of the South Half of Flathead Lake passed to the Tribes. Corvallis, they argue, was a reaffirmation of a "constitutional presumption which must be overcome by the Treaty of Hell Gate in order to convey title to the lake bed to the Tribes".

It is true that *Corvallis* recognized that new states admitted to the Union since the adoption of the Constitution have the same rights, sovereignty and jurisdiction as the original states, "subject to the rights granted to the United States by the Constitution", citing *Shively v. Bowlby, supra*, 152 U. S. at 57-58, 429 U. S. at 375. The facts and issues presented in *Corvallis*, however, are distinguishable from this case. Corvallis involved the ownership of land underlying the Williamette River, including a portion of land which was not a part of the river bed when Oregon was admitted to the Union, but as a result of a major flood was converted into the main channel of the river. The Court held that under the equal footing doctrine title to the river bed had vested in the state, and that the disputed ownership of the lands in the bed of the river "should be decided solely as a matter of Oregon law". 429 U. S. at 372.

The Court recognized in *Corvallis*, however, other situations where federal law has been applied, including *Knight v. United States Land Ass'n.*, 142 U. S. 161 (1891), where Mexico had patented tidal lands to a private owner

before ceding to the United States the territory which ultimately became the State of California and California did not succeed to the ownership of such lands upon her admission to the Union. A comparable situation is presented in this case. The rights of the Tribes vested before Montana was admitted to the Union.

Namen, Polson, and Montana contend further that a substantial change in the law was articulated in *Choctaw Nation v. Oklahoma*, 397 U. S. 620 (1970). *Choctaw*, they argue, "establish[ed] criteria by which ownership of the south half of Flathead Lake must again be measured".

Choctaw relied upon legal principles established in *Shively v. Bowlby, supra*, and *United States v. Holt State Bank, supra*. In *Shive'y*, 152 U. S. at 49-50, the Court said that the lands underlying navigable waters "shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states. . . ." In *Holt State Bank*, 270 U. S. at 55, the Court held that such grants are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain". In *Choctaw*, the Court found a "public exigency" and "very plain" intent to reserve title for the Choctaw, Cherokee, and Chicksaw Indians under various treaties and patents issued thereunder. The Court noted in particular "that the United States accompanied its grants to petitioners with the promise that 'no part of the land granted to them shall ever be embraced in any Territory or State.'" *Id.* at 365.

Namens et al. argue that the *Rochester* court found a "public exigency" by the mere creation of the reservation

and that the opening of villa sites on the Flathead Reservation destroyed the "tribal exclusivity" present in *Choctaw*. Rather, they claim that the circumstances here are similar to those in *Holt State Bank*, in which the Court determined that Congress did not intend to hold title to land underlying Mud Lake (a navigable lake within the Red Lake Indian Reservation) in trust for the Indians, and consequently title to that land was transferred to Minnesota when it became a state. As this court noted in *Pollmann, supra*, however, *Holt* did not involve the treaty provisions which *Rochester* found determinative. 364 F. Supp. at 999.[4]

While the treaty provisions construed in *Choctaw* differ somewhat from the treaty involved in this case, I find nothing in *Choctaw*[5] which would justify a departure from

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[4]As the court stated in *Rochester*, "By the terms of Article II of the treaty there was reserved for the exclusive use and benefit of the tribes a large tract of land the northern boundary of which bisected Flathead Lake, so that the whole of the southerly half of the lake is within the confines of the Reservation." 127 F. 2d at 191.

[5]*Choctaw* involved title to the land underlying the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border. The Court, with four justices joining in the majority opinion, one concurring, three dissenting, and one taking no part in the decision, held, *inter alia*, that while the "parties to the treaties and patents did not pause specifically to provide for ownership of the river bed", the Indian Tribes were granted "fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and beds of the river". 397 U. S. at 634.

Namens et al rely in part on the dissenting opinion in *Choctaw*, which does lend support to their position.

the holding in *Rochester, Namen I*, and other cases which have followed *Rochester*.

Finally, Namens et al. contend that *Wilson v. Omaha Indian Tribe, supra*, requires a reconsideration of the holding in *Namen I* that federal common law determines the nature and extent of riparian rights and that the United States as trustee for the Tribes owns the bed and banks of the lake below high water mark. They argue that the Court's adoption of state law in *Wilson* supports their contention that state law should be utilized to determine riparian ownership, and that applicable Montana and local law "clearly extends ownership to low water mark". *Wilson*, however, recognizes that " 'Indian title is a matter of federal law and can be extinguished only with federal consent' and that 'the termination of the protection that federal law, treaties and statutes extend to Indian occupancy is 'exclusively the province of federal law.'" 99 S. Ct. at 2539 (citing *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661 (1974) at 670). The Court concluded that even though "federal law governed the substantive aspects of the dispute", it was error to arrive at "a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion." *Id.* at 2543. Under the circumstances of that case, the Court concluded that it was proper to "borrow" state law and apply the law of Nebraska pursuant to provisions of a compact between Nebraska and Iowa. This conclusion does not, however, require a holding that riparian rights under the patents at issue here should be determined by state law, which is contrary to federal law.

It is true that isolated language in *Wilson* lends some support to Namens' and Montana's position that state law governs. The Court did recognize that *Wilson* was "not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees incidents of ownership to determination by the applicable state law." While not directly in point, this statement does tend to support the conclusion that the Tribes do not have the power to regulate the use of riparian rights of private owners to whom patents without reservation or restriction have been issued. I do not believe, however, that it can be extended to terminate a vested right of the Tribes under federal law in the beds and banks of the lake. This question was considered in *Rochester, supra,* when Rochester contended that "since upon the issuance of his patent, the Indian is to have the benefit of state law, the patent must be regarded as conveying title to low water mark." 127 F. 2d at 192. The court rejected this argument, holding that there was "nothing either in the treaty itself or in its setting, or in subsequent legislation, suggestive of an intent that the ownership of lands in the Reservation below the line of ordinary high water was to be at disposal of the state." *Id.* The court then recognized that the general rule "is that patents of the United States to lands bordering on navigable waters, in the absence of special circumstances, conveys only to high water mark." The effect of *Wilson* was considered in the supplemental opinion on petition for rehearing in *United States v. State of Montana, supra,* where the court concluded that there was no reason why this prinicple of *Rochester* "was not appli-

cable to the patents of the riparian land" involved in that case. 604 F. 2d at 173.[6]

On this issue *Rochester* is the law of this circuit and is controlling. Accordingly this court adheres to its prior holdings that landowners riparian to the South Half of Flathead Lake own only to high water mark, and the United States holds title to the bed and banks below that point in trust for the Tribes.

III. Diminishment or Disestablishment of the Flathead Reservation

On April 23, 1904, Congress passed the Flathead Allotment Act, provising for the survey and allotment of lands within the Flathead Indian Reservation, and for the sale and disposal of surplus lands after allotment.[7] Polson argues that this act disestablished the Reservation in its entirety.[8] Montana and the Namens argue that it effected a *pro-tanto* diminishment of the Reservation to the extent reservation lands were sold to non-tribal members. The

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[6]The court continued: "To adopt at this late date a different rule very likely would frustrate the intention of the United States in granting the patents. This can be described, we think as frustration of 'federal policy and functions'."

[7]P. L. 159, 33 Stat. 302. This Act is one of the many "surplus land acts" passed by Congress to open Indian reservations to settlement by non-Indians.

[8]The City of Polson contends that the only issue "is whether the National Congress, by adopting the Flathead Opening Act of April 23, 1904, 33 Stat. 302, intended to extinguish the exterior boundaries of the original Flathead Indian Reservation". The City suggests that surplus lands restored to tribal ownership pursuant to the Indian Reorganization Act of 1934 (Wheeler-Howard Act, 25 U. S. C. § 461 et seq., 48 Stat. 984) should be considered within a "newly constituted" Reservation.

Tribes argue the Act did no more than open Flathead Reservation to settlement by non-Indians.

Four Supreme Court decisions establish the principles which guide resolution of this issue: *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977); *DeCoteau v. District County Court*, 420 U. S. 425 (1975); *Mattz v. Arnett*, 412 U. S. 481 (1973); and *Seymour v. Superintendent*, 368 U. S. 351 (1962). The intent of Congress in passing the Act governs.[9] In discerning that intent, doubtful expressions "are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith". *Rosebud*, 430 U. S. at 586, quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973). The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status, *Mattz*, 412 U. S. at 496-97; but reservation status does not survive in the face of congressionally manifested intent to the contrary. *Rosebud*, 430 U. S. at 587; *DeCoteau*, 420 U. S. at 444-45. In all cases a congressional determination to terminate a reservation must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. *Mattz*, 412 U. S. at 505; *Rosebud*, 430 U. S. at 587.

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[9]Both the Tribes and the City of Polson have explored in depth all factors which may be significant in manifesting the intent of Congress and have set forth in detail applicable statutes, legislative histories, Presidential proclamations, regulations, and departmental letters. The Tribes filed an opening brief on this issue of 109 pages, plus 16 pages of appendices, and a reply brief of 63 pages. The City of Polson filed a 159 page brief. Montana and the Namens filed a short brief in which they also adopted the City of Polson's brief.

Applying these principles to the instant case, I conclude the Flathead Act itself does not demonstrate a clear congressional intent to diminish or disestablish the Flathead Reservation. Nor do the circumstances surrounding passage of the Act, its legislative history, and the subsequent treatment of the Reservation clearly indicate that Congress intended either diminishment or disestablishment.[10]

(A) Historical Background

By the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, the "confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians" agreed to "cede, relinquish and convey" to the United States all their "right, title, and interest" in certain described lands which had constituted their aboriginal home lands. From this cession a tract of land was reserved for use and occupation by the Tribes as a general Indian reservation. With limited exceptions the Treaty prohibited white men from residing on reservation lands without the consent of the Confederated Tribes and the superintendent and agent of the Reservation. Article VI of the Treaty authorized the President to survey the reserved land and assign portions of it to individual Indians or families who were "willing to

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[10]In arriving at this conclusion, the court has examined all exhibits and all reports of the Department of the Interior, legislative acts, including appropriation bills, commission proceedings, letters, and other documents submitted and cited by the respective parties. Specific reference is made to these documents in the memorandum of decision. To avoid extending this opinion unduly, the documents will not be specified in detail and some of the material quoted in the memorandum will be summarized or omitted.

avail themselves of the privilege" and who would "locate on the same as a permanent home", according to the same terms and regulations as provided in the sixth article of the Treaty with the Omahas.[11]

In 1887 Congress passed the General Allotment Act (the Dawes Act, 24 Stat. 388). The Act generally empowered the President to allot reservation lands to individual Indians and to negotiate with Indian tribes for the purchase and release by the tribes "in conformity with the treaty or statute under which such reservation is held" of unallotted lands to which the tribes consented to sell. *Id.* § 5. It required the United States to pay the purchase price for the surplus lands and to hold the proceeds in trust for the Indians. Upon completion of the allotment process and issuance of patents therefor, the Indian allottees were to "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory" in which they may reside. *Id.* § 6, as amended, 25 U. S. C. § 349.

Pursuant to the General Allotment Act of 1887, Congress in 1896 authorized the Secretary of Interior to appoint a commission to negotiate with various Indian Tribes, including the Confederated Tribes of the Flathead Reservation,[12] for the "cession of portions" of their reservation.

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[11]Treaty of March 16, 1854, 10 Stat. 1043. Under Article 6 the President in his discretion could require a survey of the lands within the Omaha Indian Reservation and an allotment of tracts of land to the Omaha Indians in severalty as permanent homes. Among other things the article established the size of the tracts to be allotted and established conditions under which patents could issue.

[12]These tribes consisted of the Flathead, Kootenai, and Upper Pend d'Oreilles.

Act of June 10, 1896, 29 Stat. 341-42. Over a period of years commissions proposed plans for the Flathead Tribes to cede portions of their Reservation, but the Indians rejected those proposals. In January and April, 1901, a new commission met with the Indians at St. Ignatius on the Flathead Reservation. Prior negotiators had offered the Indians a lump sum price for the sale of a portion of their Reservation. Knowing that the Indians did not think this price was high enough, the commissioners presented as an alternative at the January meeting that the Indians sell the land themselves for the highest price it would bring. The commissioners proposed an agreement to open the northern portion of the Reservation for sale as fewer full blood Indians lived there than elsewhere on the Reservation. After ten years the United States would buy the unsold land at an appraised value set by the Secretary of Interior. The commissioners informed the Indians this was the last offer to be made to them and this was the last commission to be sent to them.

Charlo, Chief of the Flathead tribe, responded that the Confederated Tribes had previously been deceived by the Government, and consequently had no reason to believe they would be treated justly this time. Under prior agreements the Tribes had consented to reductions in their reservation. Charlo's tribe had removed from the Bitterroot Valley to the Flathead Reservation, and Chief Michel's tribe, the Lower Kalispels, had moved from the Kalispell Valley. Money promised under these agreements had not been given to the Indians; consequently many of the Indians were now starving.[13]

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[13]Proceedings of a General Council held with the Indians of the Flathead Reservation at St. Ignatius, Montana, January 3, 1901, Report 168 (1897).

In April, 1901, the commissioners met with the Indians again. This time the commissioners warned the Indians that the Government would soon allot reservation lands to the Indians regardless of what they wanted. The commissioners advised the Indians that it was better for them to sell part of their land before the Government allotted it as they could get more for it if they, rather than the Government, sold it. With respect to the disposition of the proceeds from any sales, the chairman of the commission stated that half would be paid to the Indians and the other half spent by the President for "things that the Indians need"; that the "Indians will get the benefit of all money paid in"; and that the money should be distributed at least twice a year.

In rejecting the proposal, Chief Issac stated in part that before making a new treaty they wanted "to know the boundary lines of this reservation"; that the Indians didn't have any more land than they needed; and that the commissioners "had better hunt for some people who want money more than we do."[14]

On April 18, 1901, the commissioners submitted their final report to the Commissioner of Indian Affairs. In it they expressed their view that sale of the northern portion of the Flathead Reservation was still in the best interest of the Indians. That portion of the Reservation was used for grazing cattle by cattlemen whose right to be there was uncertain. They felt the Indians would get more money by selling the land than by letting the cattlemen

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[14]The statements of the commission chairman and Chief Issac are set out in more detail at pages 13-14 of the September 20, 1979 memorandum.

use it. Under the existing circumstances, however, the commissioners considered it unwise to attempt further negotiations with the Indians. They recommended that the Reservation be surveyed and allotted to the Indians and that the rights of the cattlemen using the northern portion of the Reservation be determined and the Indians be remunerated for the value of that use. That year Congress discontinued funding the negotiation attempts.

In 1903 the Supreme Court held that Congress could unilaterally abrogate treaties with the Indians.[15] In April, 1904, Congress passed bills opening for settlement all or portions of the Flathead Reservation in Montana,[16] the Rosebud Reservation in South Dakota,[17] the Devils Lake Reservation in North Dakota,,[18] and the Crow Reservation in Montana.[19] All but the Flathead Act purported to amend and ratify agreements with the respective Indian tribes for the cession of large tracts of reservation lands. In contrast, no cession agreement with the Flatheads existed for Congress to amend or ratify.

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[15]*Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903). The Court stated: "The power exists to abrogate the provisions of an Indian Treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it do so." *Id.* at 566.

[16]See supra, n. 7.

[17]Act of April 23, 1904, 33 Stat. 254.

[18]Act of April 27, 1904, 33 Stat. 319.

[19]Act of April 27, 1904, 33 Stat. 352.

(B) Flathead Allotment Act

The Flathead Allotment Act of April 23, 1904, directed the Secretary of the Interior to survey the Flathead Indian Reservation and to make allotments under the provisions of the allotment laws of the United States to all persons having tribal rights with the Confederated Tribes. Upon completion of the allotment process, a commission was to appraise and value all unallotted lands. The unallotted lands were then to be "opened to settlement and entry by proclamation of the President" under the general provisions of the homestead, mineral and town site laws. In so providing, Congress used no express language indicating the tribes were "ceding" their reservation lands or were disclaiming any "right, title, or interest" to those lands, nor did it expressly indicate it intended to terminate the reservation status.

In contrast is the language used in the surplus land acts involved in *DeCoteau* and *Rosebud*. In *DeCoteau* an 1891 Act of Congress[20] ratified an 1889 Agreement with the Sisseton-Wahpeton Tribe in which the Tribe agreed to "cede, sell, relinquish, and convey" to the United States all its "claim, right, title, and interest" in the unallotted lands within its reservation. The Supreme Court found this language "precisely suited" to accomplish the termination of the reservation and to return the lands ceded to the public domain. 420 U. S. at 445-46. In *Rosebud*, a 1904 Act of Congress[21] amended and ratified a 1901 Agreement with the Rosebud Sioux Tribe in which that tribe agreed

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[20]Act of March 3, 1891, 26 Stat. 1035.

[21]See *supra*, n. 17.

to "cede, surrender, grant, and convey" to the United States all its "claim, right, title, and interest" in all unallotted reservation lands within Gregory County, South Dakota. As in *DeCoteau*, the Supreme Court found this language precisely suited to disestablishment of those lands from the reservation.

The method of payment for the lands established by the Flathead Act also supports the conclusion that Congress did not intend the Act to diminish or disestablish the reservation. In *DeCoteau* the 1891 Act which ratified an agreement with the Tribe, did not merely open the lands to settlement; it also appropriated and vested in the Sisseton-Wahpeton Tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of all the Tribe's claim, right, title, and interest in the unallotted lands. The Court distinguished that situation from those found in *Mattz* and *Seymour* in which the Act, unilateral in character, merely opened the reservation to settlement and provided that uncertain future proceeds of settler purchases should be applied to the Indians' benefit. *DeCoteau*, 420 U. S. at 448.

The Flathead Act, likewise unilateral in character, also involved uncertain future proceeds. The sale price of the unallotted lands on the Flathead Reservation was its appraised value as fixed by the commission. 33 Stat. 302, § 9. If after five years land opened for settlement remained unsold, it was to be sold at auction to the highest bidder for a price not less than its appraised value. *Id.* § 13. The Act expressly provided that nothing in it would bind the United States to purchase any of the unreserved land that had been opened for settlement or to guarantee

to find purchasers for the land. The United States was acting solely as a trustee for the Indians to dispose of the land and to pay the proceeds received from its sale only as received. *Id.* § 16.

(1) Circumstances Surrounding Passage of the Act

In *DeCoteau* and *Rosebud* the Supreme Court found support for its conclusion that the reservations involved were disestablished and diminished in the history preceding passage of the pertinent Acts. In *DeCoteau* negotiations took place in 1889 with the object of opening the Lake Traverse Reservation to settlement. In meetings with the local white community, tribal spokesmen said: "We never thought to keep this reservation for our lifetime." The Indians were more than willing to sell the surplus lands as they wanted "to get the benefit of the sale". If the Government paid what it owed on past claims and paid what it had agreed to pay per acre, the Indians would "be pleased with the opening". 420 U. S. at 433. The Court found the surrounding circumstances "fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose." *Id.* at 448. In *Rosebud* a Government inspector obtained the written consent in 1901 of three-fourths of the male Indian adults to the cession of the unallotted reservation lands in Gregory County for the sum of $1,040,000. Although this particular agreement was not ratified by Congress because it objected to paying for the lands outright, it ratified an amended version of the agreement which provided a different method of payment. The Court found these factors represented "an unmistakable baseline purpose" of the Indian tribes and government to diminish the reservation. 430 U. S. at 592.

The history of negotiations with the Tribes of the Flathead does not support a similar conclusion. The Flathead Tribes were distrustful of the commission because of past experience. Many of them wanted to retain their reservation lands even though they would remain in an impoverished condition. Consequently, they refused to cede any portion of their Reservation.

(2) Legislative History of the Act

The sparse legislative history of the Flathead Act does not clearly indicate an intent to diminish or disestablish the Flathead Reservation. At best, the history is equivocal. In 1903 and 1904 Congressman Dixon of Montana introduced a series of bills into the House of Representatives, each providing for the survey and allotment of lands within the Flathead Reservation and the sale and disposal of surplus lands after allotment.[22] The House Committee Report on the bill which eventually passed[23] reflected an apparent need of the Committee to justify the forced allotment and sale of the Flathead Reservation lands in the absence of a "cession" agreement with the Flathead Tribes. The Report recited Article 6 of the 1855 Treaty with the Tribes which expressly provided that the President at his discretion could survey the Flathead Reservation and make allotments to the Indians "on the same terms and subject to the treaty with the Omahas, so far as the same may be applicable". The Report then noted that that article in the Omaha treaty "ex-

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[22]The bills were: H. R. 8324 (1903); H. R. 11349 (1904); H. R. 11673 (1904); and H. R. 12231 (1904).

[23]H. R. Rep. No. 1678, 58th Cong., 2d Sess. (1904).

pressly provides for the sale of all the surplus lands, paying the proceeds to the Indians".[24] The Committee Report expressed concern that fertile lands within the reservation were "lying idle and unoccupied". It estimated that only 100,000 acres of the $1,450,000 acre reservation would be needed for allotments, "leaving 1,350,000 acres for settlement". All proceeds from the sale of surplus lands, less administration expenses, were to go to the Indians. The only appropriations required of Congress were to pay the Indians for lands reserved for agency, school, and missionary purposes, and for sections 16 and 36 of each township within the reservation, "the same to be ceded to the State of Montana for school purposes, in accordance with the enabling act of Montana". Of the bill the Committee said: "We believe no fairer plan can be devised to protect every right of the Indian."

Accompanying the Committee Report was a letter from the Secretary of Interior who, subject to certain amendments, recommended passage of the bill. The Secretary outlined the goals of his Department concerning

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[24]In discussion of the bill on the House floor, Representative Burke of South Dakota, a strong advocate of reservation openings, took issue with this portion of the House Committee Report, which he characterized as "misleading". He argued there was no express provision in the 1855 Treaty that after the Indians had taken their allotments the surplus lands should be sold and the proceeds paid to the Indians, nor was it "even contemplated by said treaty". Article 6 of the 1855 Treaty referred only to allotments and made no reference to disposition of surplus lands. 38 CONG. REC. APP. 102-03 (1904).

The Court of Claims held that the Treaty of Hell Gate did not signal tribal consent to the opening of the Reservation and to the sale of surplus lands, nor did the Tribes at anytime thereafter consent to that. *Confederated Salish and Kootenai Tribes v. United States*, 437 F. 2d 458, 463 (Ct. Cl. 1971).

the Flathead Tribes: to make allotments to the Indians of the Flathead Reservation; to make provision for irrigation of their allotments; and to place all the Indians on the reservation in a position to improve their condition and support themselves. Absent was any intent to lessen federal responsibility for the Indians.

Among the amendments the Secretary recommended, one is of particular importance. Section 8 of the bill granted sections 16 and 36 of each township to the State of Montana for school purposes. In case any Indian had previously selected an allotment in one of these sections, the Governor, with the approval of the Secretary of the Interior, was authorized to locate lieu lands "in the tract herein ceded". The Secretary recommended that the words "herein ceded" be stricken and the words "under consideration" be substituted. He argued: "The Flathead Indians have not agreed to any cession of the lands comprising their reservation, and no such cession is contemplated." The final version of the bill reflected the requested amendment.

From the legislative history, it is clear Congress was attempting to open reservation lands for settlement in a manner that would "protect every right of the Indian". Whether Congress intended to terminate reservation status of the opened lands is unclear. Although Congress' granting Montana school lands on the reservation in accordance with Montana's enabling act would indicate such an intent,[25] that intent is contradicted by Congress' adop-

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[25]The City of Polson's contentions regarding the effect of the grant for school purposes is discussed further at pages 25 to 27.

tion of the amendment requested by the Secretary of the Interior.

(3) Other Provisions of the Flathead Allotment Act

Polson contends that other provisions of the Flathead Allotment Act manifest a congressional intent to disestablish the Reservation, i. e., (1) providing for disposal of lands under the town site laws; (2) granting sections 16 and 36 to the State of Montana for school purposes; (3) the reservation of certain Reservation lands for agency, school and missionary purposes (*Id.* § 12); and (4) a 1909 amendment, passed three months before the Presidential Proclamation declaring the Reservation open for settlement, which provided that the "lands allotted, those retained or reserved, and the surplus lands sold or otherwise disposed of" were subject for 25 years to all the laws of the United States prohibiting the introduction of intoxicants into Indian country.[26]

(a) Town Site Laws

By statute the town site laws were not applicable to "military or other reservations" made before March 2, 1867.[27] Polson argues that the provision in the Flathead Allotment Act for disposition of lands under the town site laws indicates that the Reservation was no longer in exist-

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[26]Act of March 3, 1909, 35 Stat. 795.

[27]Act of March 2, 1867, 14 Stat. 541 (repealed 1976), which reads in pertinent part:

> The provisions of this Chapter [Reservation and Sale of Town sites Or the Public Lands] shall not apply to military or other reservations heretofore [before March 2, 1867] made by the United States, . . .

ence. It appears to the court, however, that the inclusion of this provision in the Allotment Act might well be construed to support the opposite conclusion. If the Reservation had been disestablished and were no longer in existence, an express provision making the town site laws applicable would not have been necessary. On the other hand, if the opened land was still a part of the Reservation, the town site laws would not be applicable, and an express statement by Congress was required to make them applicable. It may reasonably be inferred that in including this provision, Congress recognized that the town site laws would not otherwise have been applicable.[28]

(b) Grants for School Purposes

As noted above, Section 8 of the Flathead Act "except[ed] from settlement sections sixteen and thirty-six

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[28]In *Seymour*, the Supreme Court rejected the State of Washington's argument that establishment of town sites by the federal government pursuant to an act opening the diminished Colville Indian Reservation to settlement, Act of March 22, 1906, 34 Stat. 80, was inconsistent with continued existence of the Reservation. 368 U. S. at 357-59. Polson argues the town site provision in *Seymour* cannot be compared to the one in the Flathead Act because the former Act did not make the town site laws applicable but charged the Secretary of the Interior with developing regulations for the survey and disposal of land for town sites. This distinction is immaterial. Town sites in both Acts were for the benefit of the settlers, not the Indians. The former Act empowered the Secretary to reserve town sites as would be required for "future public interests", not Indian interests. In a 1906 amendment to the Flathead Act, Act of June 21, 1906, 34 Stat. 354-55, Congress directed the Secretary of the Interior to establish town sites on the reservation at seven existing settlements (Arlee, Dayton, Ravalli, Dixon, Ronan, St. Ignatius, and Polson) and at such other places as the Secretary deemed necessary or convenient. Congress directed the Secretary to act "in such a manner as will best subserve the present needs and the reasonable prospective growth of said settlements".

of each township, which are hereby granted to the State of Montana for school purposes". Section 10 of the Montana Enabling Act of February 22, 1889, 25 Stat. 679, provided that lands embraced in Indian and other reservations would not be subject to the grants "until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain". Polson contends that under these provisions, it is "conclusive that Congress intended to extinguish the original boundaries of the Reservation".

It is true, as Polson argues, that the Court in *Rosebud* held that a similar grant in the Rosebud Act supported a congressional intent to disestablish the reservation. 430 U. S. at 599-601.[29] The Court made it clear, however, that no one factor or set of factors is conclusive in ascertaining congressional intent. Rather a court must examine the operative language of the enactment, the history of the reservation, and the surrounding circumstances. It must then balance these factors which favor disestablishment against the factors which do not. 430 U. S. at 598, n. 20.

In *United States v. Long Elk*, 565 F. 2d 1032 (8 Cir. 1977), the court considered whether a 1913 Act of Congress,[30] which opened unallotted portions of the eastern half of the Standing Rock Reservation located in North and South Dakota, diminished the Reservation. The court reviewed the Act in light of *Rosebud* and other disestablishment decisions. Although the 1913 Act contained a

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[29]Montana and South Dakota were admitted under the same enabling act.

[30]Act of February 14, 1913, 37 Stat. 675.

provision granting to North and South Dakota, respectively, sections 16 and 36 of each township in the area opened by the Act, the court concluded the Act had not diminished the Standing Rock Reservation. It found the contrasts between the 1913 Act and the Acts involved in *Rosebud* were more striking than the similarities and the surrounding circumstances did not reflect an intent to disestablish any part of the Reservation. 565 F. 2d at 1039.[31]

(c) Reservation of Lands for Agency School and Missionary Purposes

Section 12 of the Act reserved from disposal "all agency buildings, substations, mills and other governmental institutions now in use *on said reservation* or which may be used or occupied by the Government of the United States". (Emphasis added). Sections 15 and 16 provided for the purchase of these lands. Polson argues that the "Government's purchase of existing agency, mission and Indian school lands strongly suggests" a congressional intent that the Reservation was to be extinguished.

The Act opening the Devils Lake Reservation, *supra*, n. 18, also reserved from disposal lands for agency, school

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[31]The court found the following contrasts: (1) the face of the Act did not manifest an intent to terminate the reservation status of the land; (2) no agreement was made between negotiators and the tribe to terminate the reservation staus of the land; (3) the legislative history of the Act opening the Reservation did not disclose a congressional intent to terminate reservation status of the land; (4) the Presidential proclamation declaring the land open contained no words of termination or disestablishment; and (5) the subsequent jurisdictional history did not clearly establish that the states of North and South Dakota exercised jurisdiction over the part of the reservation affected by the Act. 565 F. 2d at 1039.

and missionary purposes. The acts opening the Rosebud Sioux Reservation, *supra*, n. 17, and the Crow Reservation, *supra*, n. 19, did not contain these provisions. Polson argues this contrast shows Congress intended to disestablish the Flathead Reservation because the reservations were required where the entire reservation was being extinguished. This factor apparently has not been considered in any of the decided cases, and I find no merit in Polson's contention. The Acts affecting the Rosebud Sioux and Crow Reservations simply removed a block of land from the remaining reservations. The Flathead and Devils Lake Acts opened all unallotted portions of the reservations to settlement. The reservation of the lands for agency, school and missionary purposes kept these lands from being sold and indicates that Congress did not intend to lessen its responsibility to the Indians.

(d) Prohibiting Sale of Intoxicants to Indians

The Act of March 3, 1909, amending the Flathead Allotment Act, provided that the "lands allotted, those retained or reserved, and the surplus lands sold or otherwise disposed of shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country". A similar provision in the Act of May 30, 1910, 36 Stat. 448, affecting the Rosebud Reservation, was considered by the Supreme Court in *Rosebud*. The Court said in part: "As there existed, in 1910, an outstanding prohibition against the introduction of intoxicants into 'Indian country', see Act of July 23, 1892, 27 Stat. 260, the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country', because

not in the Reservation." 430 U. S. at 613. In a footnote, the Court said: "The liquor provision in § 10 of the 1910 Act, accordingly, is a strong indication that Congress did not view the affected areas as 'Indian country,' but, rather, as disestablished from the Reservation." *Id.* at 615, n. 47.

(4) Subsequent History of the Reservation

In examining the subsequent history of reservations opened to settlement, courts have looked at both the administrative and jurisdictional treatment of the reservation. Although evidence on these points is entitled to some weight in determining whether Congress intended to diminish or disestablish a reservation, primary focus remains upon the language of the Act in question. *Rosebud,* 430 U. S. at 588. Administrative practice cannot be allowed to alter what Congress intended. *City of New Town v. United States,* 454 F. 2d 121, 125 (8 Cir. 1972).[32] The evidence of the administrative and judicial treatment of the Flathead Reservation, which I find contradictory, does not clearly indicate Congress intended to disestablish or diminish the Flathead Reservation.

(a) Administrative History

The Flathead Act provided that the Reservation should be opened to settlement by proclamation of the

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[32]In *New Town,* the City of New Town claimed a 1910 Act of Congress, Act of June 1, 1910, 36 Stat. 455, diminished the Fort Berthold Indian Reservation, thereby leaving the City outside the diminished Reservation. In a 1962 letter, the Deputy Commissioner of Indian Affairs concluded that the City was outside the Reservation but that another part of the Reservation which Congress had opened to settlement was within the Reservation because of an administrative practice of so treating it. The court found that Congress had not intended to disestablish any of the opened area from the Reservation. 454 F. 2d at 127.

President. On May 22, 1909, President Taft proclaimed the opening of the Reservation, effective September 1, 1910. The proclamation declared that certain agricultural lands "be disposed of under the provisions of the homestead laws of the United States". It contained no words indicating that a cession of reservation lands was involved or that termination of reservation status of the opened lands was intended.[33]

Both the Tribes and Polson have submitted innumerable documents from governmental agencies which each claims support its position. Generally, most of Polson's documents are letters or memoranda from the General Land office of the Department of Interior, the bureau responsible for handling the sale of opened lands on the reservation. These documents, which cover the years 1910 to 1940, generally refer to the opened lands as those "within the former Reservation". Polson has also submitted copies of advertisements for homesteads and villa site lots[34] which generally refer to the land as within the "former Flathead Reservation" and applications and patents for these lands which refer to them as "public lands". A 1939 map of the Reservation, prepared by the Forest and Grazing Division, Office of Indian Affairs, Department of Interior, entitled it the "former Flathead Indian Reservation". Polson argues these documents show that

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[33]Provisions of the proclamation are set forth at pages 25-26 of the September 20, 1979 memorandum.

[34]Lots along the shore of Flathead Lake were sold as "villa sites" rather than as agricultural land because of their increased value as such. Act of April 12, 1910, 36 Stat. 296 (amending Act of April 23, 1904, 33 Stat. 302); S. Rep. No. 117, 61st Cong., 2d Sess. (1910).

the opened lands were administratively treated as no longer within the Reservation.

In contrast to these documents are those submitted by the Tribes—reports, letters, and memoranda from the Office of the Commissioner of Indian Affairs or the United States Indian Service which generally refer to the Reservation as a whole. Additionally, not all of the documents submitted by Polson are consistent in their method of referring to lands within the Reservation. Some refer to ceded Indian lands. Clearly this is an improper description because the Tribes never ceded lands.[35] A 1972 Bureau of Indian Affairs map, which identifies ownership status of lands within the Reservation, identifies the area as the "Flathead Indian Reservation." Not even Congress was consistent in its post-1910 references to the Flathead Reservation. While some bills referred to opened lands as "within the former Flathead Reservation", others referred to them as "within the Flathead Reservation".[36]

(b) Jurisdictional History

The Tribes admit that from the opening of the Reservation until 1948, Montana and its political subdivisions[37]

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[35]See *supra*, pages 19, 24.

[36]See, e. g., Act of June 27, 1918, 40 Stat. 616. The bill authorized the Secretary of Interior to issue a patent to G. H. Beckwith for certain lands "within the Flathead Indian Reservation, Mont". A letter from the Secretary which accompanied the Report located the lands "within the subagency reserve, adjoining but not in the town of St. Ignatius". S. Rep. No. 254, 65th Cong., 2d Sess. 1 (1918).

[37]When the Flathead Reservation was opened to settlement,, it lay within parts of three existing Montana counties: Missoula, Flathead, and Sanders. In 1922 Lake County was created from portions of the other three counties.

assumed jurisdiction over actions by non-Indians and citizen Indians[38] on at least the alienated lands within the Flathead Reservation.[39] This included generally actions by persons on lands to which the United States had relinquished title, such as reservation land opened to homestead entry, town site land sold to settlers, land for which Indians had received fee patents, and Reservation land ceded to railway companies as rights-of-way. Although the Tribes did have an established court system during this time (Court of Indian Offenses), the Tribes and the Federal Government often limited their respective juris-

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[38]By "citizen Indians" the Tribes refer to those Indians who had obtained fee patents to their allotments as opposed to "ward Indians" whose allotments were subject to trust conditions imposed by the United States. Initially the General Allotment Act provided that Indian allottees would receive a patent for the allotted lands to be held in trust by the United States for a period of 25 years. Act of February 8, 1887, § 5, 24 Stat. 388. Upon receiving a "trust" patent for the allotted lands, the allottees became citizens of the United States and subject to the laws of the state or territory in which they resided. *Id.* at § 6. In 1906 the Burke Act amended section 6 of the General Allotment Act, delaying the time when allottees became citizens and subject to state law until the expiration of the trust period "when the lands have been conveyed to the Indians by patent in fee". The 1906 Act provided, however, that the Secretary of Interior could issue a fee patent free of restriction prior to the expiration of the 25 year period "to any Indian allottee that is capable of managing his or her affairs". Act of May 8, 1906, 34 Stat. 182.

[39]Although no reported cases were found concerning the Flathead Reservation, Montana only exercised jurisdiction over "citizen Indians" who committed crimes on other reservations within the State based upon the principles noted *supra*, n. 38. See, e. *g.*, *State v. Big Sheep*, 243 P. 1067 (Mont. 1926) (Crow Reservation); *State v. Monroe*, 274 P. 840 (Mont. 1929) (Blackfoot Reservation); *State v. Phelps*, 19 P. 2d 319 (Mont. 1933) (Crow Reservation); and *State v. Youpee*, 61 P. 2d 832 (Mont. 1936) (Fort Peck Reservation).

diction to "ward" Indians on tribal lands or allotted trust lands within the Reservation.[40]

In 1934 Congress passed the Indian Reorganization Act (Wheeler-Howard Act), authorizing Indian tribes to organize for their common welfare.[41] Pursuant to this Act, the Tribes adopted a constitution and by-laws, and incorporated. The Tribal Constitution secured to the Tribes "the power to exercise certain rights of self-government not inconsistent with Federal, State, and local laws,"[42] and declared that the jurisdiction of the Tribes "shall extend to the territory within the original confines of the Flathead Reservation as defined in the Treaty of July 16, 1855" (Art. I). The constitution created a Tribal Council which had the power, among other things, to promulgate and enforce ordinances providing for assessments or license fees upon nonmembers doing business upon the Reservation or obtaining special rights and or privileges (Art. VI, §1(i)); to promulgate and enforce ordinances governing the conduct of members of the Confederated Tribes, and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court (Art. VI, §1(l)); and to regu-

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[40]Numerous letters with respect to the assumption of jurisdiction by the State of Montana and its political subdivisions are specified in footnotes 42 to 47 on pages 28-29 of the September 20, 1979 memorandum.

[41]Act of June 18, 1934, § 16, 40 Stat. 984 (codified at 25 U. S. C. §§ 461 *et seq.*). The Act also ended the allotment process and authorized the Secretary of Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation previously opened to sale. *Id.* at §§ 1 and 3.

[42]Constitution and By-laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Preamble (October 28, 1935).

late the domestic relations of members of the Confederated Tribes (Art. VI, § 1(q)).

After passage of the Indian Reorganization Act, the Court of Indian Offenses was changed to the Flathead Tribal Court. In December, 1936, the Tribal Council adopted a Law and Order Code, subsequently approved by the Secretary, which extended the Tribal Court's authority "to all members of the Confederated Salish and Kootenai Tribes, residing within the limits of the original boundaries of the Flathead Indian Reservation".[43] In 1948, the Government codified the definition of "Indian country" to include all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, "notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation".[44] In *State ex rel. Irvine v. District Court*, 239 P. 2d 272, 280 (Mont. 1951), the Montana Supreme Court noted that the intent of Congress in adopting this definition was to restrict the "exclusive jurisdiction of the United States to those Indian reservations which have been set apart and organized by and which are under the supervision of the General Government for and as Indian reservations laying within a state". The court recognized

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[43]Code of Indian Tribal Offenses. The Code expressly identified "fee patented lands, roads, water, bridges, city property, townsites, incorporated cities or towns, or other alienated areas within the confines of the original boundaries of said reservation," as within the Tribal Court's jurisdiction.

[44]18 U. S. C. § 1151.

the Flathead Reservation as such a reservation. *Id.* at 275.[45]

From the *Irvine* decision until 1964, Montana, with limited exceptions, did not exercise criminal jurisdiction over crimes committed by Indians within the exterior boundaries of the Reservation.[46] During this period the

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[45]Irvine, an Indian, had been convicted in state district court of burglary, one of the "Ten Major Crimes" prohibited by 18 U. S. C. § 1153 and made subject to the exclusive jurisdiction of the United States when committed by an Indian in "Indian country". Although the state conceded that the offense had been committed "within the exterior boundaries of the Flathead Indian Reservation," it argued that the state district court had jurisdiction because the offense was committed in the town of Ronan, Montana, on land which the United States had alienated. The Montana Supreme Court held that the state district court was without jurisdiction. 239 P. 2d at 281.

[46]In *State v. McClure*, 268 P. 2d 629 (Mont. 1954), the Montana Supreme Court held that the state courts were without jurisdiction to try the defendants, enrolled members of the Confederated Salish and Kootenai Tribes, who had killed antelope on fee patented land within the exterior boundaries of the Flathead Reservation in violation of both state and tribal law. After reviewing the hunting and fishing provisions of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, the court concluded:

> [T]he rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat. 975, have never been alienated, still exist unimpaired and that as far as the state laws are concerned, the Indian tribes bound by the treaty are entitled to hunt and fish therein at any time. The only restriction thereon is the ordinances and laws of their own council and the laws of the United States.

268 P. 2d at 635. One justice concurred in the opinion, two justices concurred in the result, but not all that was said in the opinion, and one justice dissented.

In 1977 The Montana Supreme Court further held that under the Treaty of Hell Gate enrolled members of the Confederated Salish and Kootenai Tribes retained the right to hunt free of state regulation on "open and unclaimed" land within the boundaries of the lands ceded to the federal government by that Treaty. *State v. Stasso*, 563 P. 2d 562, 565 (Mont. 1977).

Federal Government exercised exclusive jurisdiction over Indians who committed crimes in violation of the "Ten Major Crimes Act", 18 U. S. C. § 1153. The Tribes exercised jurisdiction over all other crimes committed by Indians, although the State generally handled juvenile problems and law enforcement on the Reservation's highways. In 1964 Montana, with the consent of the Confederated Tribes, assumed criminal jurisdiction over the Indians and Indian Territory of the Flathead Reservation.[47]

The State and its subdivisions began to exercise civil jurisdiction soon after the Reservation was opened. The Indians applied for marriage licenses from the counties and generally complied with state marriage and divorce laws, although it was not uncommon for the Court of Indian Offenses to exercise jurisdiction over Indians who failed to comply with these laws. Roadwork on the Reservation, which prior to the Reservation's opening had been under the Indian agent's supervision, was taken over by the State and counties, although they were still required to receive approval from the superintendent of the

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[47] 1963 Mont. Laws, Ch. 81, §§ 1-6 (codified at Revised Codes of Montana (R. C. M.) 1947 §§ 83-801 to 806). Montana acted pursuant to Public Law 280, Act of August 15, 1953, 67 Stat. 588, in which the United States gave its consent to the people of any state to amend, where necessary, their state constitutions or existing statutes to remove any legal impediment to the state's assumption of civil and criminal jurisdiction, and to assume such jurisdiction by affirmative legislative action. Although Public Law 280 at the time did not require states to do so, Montana sought the consent of the Confederated Tribes to the assumption of jurisdiction upon receipt of a resolution from the governing body of the Confederated Tribes consenting to the assumption. R. C. M. 1947, § 83-802. On May 16, 1964, the Flathead Tribal Council passed Tribal Ordinance 40-A, consenting to Montana's adoption of criminal jurisdiction. See *State ex rel. McDonald v. District Court*, 496 P. 2d 78 (Mont. 1972).

Reservation for locating roads. The counties established public schools within the Reservation which were attended by both Indian and non-Indian children.[48]

In 1973 the Montana Supreme Court recognized severe restrictions upon the state's right to exercise civil jurisdiction over Indians. It held that state courts could assume jurisdiction over civil disputes involving commercial transactions entered into on the Flathead Reservation between an enrolled member of the Confederated Salish and Kootenai Tribes residing on the Reservation and a nonmember only if three conditions were met: (1) applicable federal treaties and statutes had not preempted state jurisdiction; (2) the exercise of state jurisdiction would not interfere with reservation self-government; and (3) the Tribal Court was not currently exercising jurisdiction or had not exercised jurisdiction in such a manner as to preempt state jurisdiction. *Security State Bank v. Pierre,* 511 P. 2d 325, 327 (1973).[49] Polson recognizes that the effect of this decision was to "extinguish" the state's jurisdiction over civil disputes involving Indians which arise on the Reservation.

(5) Judicial Recognition of Continued Existence of Flathead Reservation

Finally, I find support for the conclusion that the Flathead Reservation has not been disestablished or di-

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[48]From annual reports to the Commissioner of Indian Affairs specified in footnotes 59 to 63, at page 32 of memorandum of September 20, 1979.

[49]The court found that none of the three tests were met and consequently the state court was without jurisdiction. 511 P. 2d at 327, 330. The court made its decision without reference to whether the transaction was entered into on trust lands, tribal lands, or lands owned in fee.

minished in the recognition in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U. S. 463 (1976), of the continued existence of the Reservation. The Court held in *Moe* that a personal property tax as applied to reservation Indians and a cigarette tax as applied to on-reservation sales by Indians to Indians were in conflict "with congressional statutes which provide the basis for decisions with respect to such impositions", citing *McClanahan, supra*, and *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973), 425 U. S. at 481.[50] While the question of diminishment or disestablishment of the Reservation was not expressly considered, the Court did note the history and development of the Reservation[51] and the relationship

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[50]The Court affirmed decisions of a three-judge court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975) and *Tribes v. State of Montana*, 392 F. Supp. 1325 (D. Mont. 1975). One member of the court had dissented, taking the position that the Flathead Indians were sufficiently within the jurisdiction of the State of Montana to be entitled to state services, and, except as to trust lands, subject to state taxation. The dissent relied in part on the provisions of the allotment acts, the Montana Enabling Act, the development and integration of the Reservation, citizenship of the Indians, and services provided by state and local governments.

[51]In describing the Reservation the Court said in part:

> Slightly over half of its 1.25 million acres is now owned in fee, by both Indians and non-Indians; most of the remaining half is held in trust by the United States for the Tribe. Approximately 50% of the Tribe's current membership of 5,749 resides on the reservation and in turn composes 19% of the total reservation population. Embracing portions of four Montana counties—Lake, Sanders, Missoula, and Flathead—the present reservation was generally described by the District Court:
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> > "The Flathead Reservation is a well-developed agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominately

(Continued on following page)

between the existence of a reservation and the existence of federal jurisdiction.

The State contended that the district court had failed to properly consider the effect of the General Allotment Act of 1887 and the Flathead Allotment Act of 1904, and particularly Section 6 of the General Allotment Act, 25 U. S. C. § 349, which provides in part:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . ."

The State argued that the General Allotment Act has never been explicitly repealed and that Congress never intended to withdraw Montana's taxing jurisdiction. In rejecting this contention, the Court said:

> We find the argument untenable for several reasons. By its terms § 6 does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State

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Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.

Id. at 466-467.

in *Seymour v. Superintendent*, 368 U. S. 351 (1962),[52] to which we responded:

> "[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.* at 358.

We concluded that "[s]uch an impractical pattern of checkerboard jurisdiction," *ibid.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction.[53] See also *United States v. Mazurie*, 419 U. S. 544, 554-555 (1975).

The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:

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[52] In *Seymour* the State of Washington pressed as an alternative contention the fact that the offense was committed within a own laid out by the Federal Government. The State argued that when "the townsite plot was filed for record . . . all lands encompassed within the townsite were thereby dedicated to the public interest" and this dedication was "inconsistent with any reservation for the Indians". The Court rejected this argument and said further: "Moreover, the State can point to no language in § 1151's definition of Indian country which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation." 368 U. S. 358-359.

[53] *Moe* and *Seymour* were both cited in *United States v. Long Elk, supra*, 565 F. 2d at 1039, n. 12.

> "Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390 . . . ." *Mattz v. Arnett*, 412 U. S. 481, 496 (1973).
>
> "The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U. S. C. § 461 *et seq.*" *Id.* at 496 n. 18.

The State has referred us to no decisional authority —and we know of none—giving the meaning for which it contends to § 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U. S. at 173-179. See also *Kennerly v. District Court of Montana*, 400 U. S. 423 (1971). Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U. S. at 477-79.

(6) Conclusion Re Diminishment and Disestablishment

Weighing all of the factors, I conclude that in passing the Flathead Allotment Act Congress did not intend to diminish or disestablish the Flathead Reservation. I find support for this conclusion in the circumstances surrounding passage of the Act, the legislative history of the

Act, and the subsequent history of the Reservation. Although Congress authorized, and the Department of Interior sought, a cession of the northern portion of the Flathead Reservation, the Flathead Tribes refused to make this cession. Although Congress subsequently opened the entire reservation to settlement, the legislative history indicates Congress did not contemplate a "cession" of Indian lands. Although the State of Montana at various times exercised criminal and civil jurisdiction over Indians residing on the Reservation, Montana Supreme Court decisions have held that the State has limited jurisdiction over Indians residing on the Reservation. Finally, and most important, prior state and federal court decisions have recognized the existence of the Flathead Reservation as an integrated unit with defined boundaries. Nonrecognition now could result in a confusing checkerboard pattern of jurisdiction which the Supreme Court recognized as impractical in *Seymour* and *Moe*. In contrast to these factors are an inconclusive history of the administrative treatment of the Flathead Reservation and two provisions in the Flathead Act which provide support for a finding of disestablishment. Considered together these do not counterbalance the factors against disestablishment.

IV. Tribe's Right to Regulate Riparian Development

(A) Legal Background

Through its constitutional power to regulate commerce, Congress has supreme control of navigable waters within the country. Under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), Congress has prohibited any obstruction to the navigable capacity

of any waters of the United States not otherwise affirmatively authorized by it, and, in most instances, requires persons to obtain the recommendation of the Corps of Engineers and authorization from the Secretary of the Army before building any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure upon any navigable water of the United States. Under the Federal Water Pollution Control Act, 33 U. S. C. §§ 1251-1376 (1976), Congress regulates the discharge of pollutants and dredged or fill material into navigable waters.[54] At the same time, Federal regulations recognize that state and local agencies may also regulate waters within their jurisdictions. 33 C. F. R. § 320.4(j) (1979). As of October, 1977, the Corps of Engineers took the position that Flathead Lake was considered to be "waters of the United States" for purposes of 33 U. S. C. § 1344 (1976), but was not considered to be "navigable waters of the United States" for purposes of 33 U. S. C. § 403 (1976).[55]

Montana currently asserts jurisdiction over Flathead Lake under various statutes and through state regulatory agencies and local government units. Sections 85-16-101 *et seq.*, Montana Code Annotated (M. C. A.) (1979), grant landowners riparian to navigable waters within the

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[54]Congress established as its national goal the elimination of the discharge of pollutants into navigable waters. At the same time, Congress recognized "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources". . . . 33 U. S. C. §§ 1251(a)(1) and (b)(1976).

[55]Letter from Charles E. Knowlton, Jr., Acting District Counsel, Corps of Engineers, to Urban Roth, October 17, 1977, Doc. No. 263.

State of Montana a license to build docks and wharves, subject to regulation by the State's Public Service Commission.[56] Under Montana's Water Use Act of 1973, the Department of Natural Resources and Conservation regulates at least non-Indian use of Flathead Lake within the Flathead Reservation. In 1975 Montana's Legislature passed the "Lakeshore Protection Act", M. C. A. (1979) §§ 75-7-201 *et seq.*, which gives local governments "the primary public roles in establishing policies to conserve and protect lakes". The Act requires persons who propose to do any work which would "alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore" to first secure a permit for the work from the local governing body which, under the Act, is required to establish guidelines to evaluate permit applications.[57]

In July, 1977, the Tribes adopted the "Shoreline Protection Ordinance", Ordinance 64A (Revised), which, after receiving the approval of the Secretary of the Interior, became effective August 1, 1977. By its terms the Ordinance applies to Flathead Lake and any other body of water navigable in fact located within the outer boundaries of the Reservation. The Ordinance regulates the

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[56]The license is to build docks and wharves "over, across, and upon the lands under water belonging" to the State of Montana. M. C. A. § 85-16-101 (1979).

[57]M. C. A. (1979) § 75-7-204. The Act requires every governing body having jurisdiction over an area containing a lake to adopt regulations for the issuance or denial of permits for work in lakes. The regulations are to favor issuance if the proposed work would not materially diminish water quality, materially diminish habitat for fish or wildlife, interfere with navigation or other lawful recreation, create a public nuisance, or create a visual impact discordant with natural scenic values. M. C. A. (1979) §§ 75-7-207 and 208.

creation of landfills and dredging; requires permits for the installment of new wharves, docks, breakwaters on similar structures on the bed and banks of navigable waters within the Reservation; requires persons who maintain such existing structures on the bed or banks of navigable waters within the Reservation to apply for permits within six months of the effective date of the Ordinance; and establishes guidelines for the issuance of permits for new and existing structures. The Ordinance creates a Shoreline Protection Board to carry out the terms of the Ordinance and to assess specified penalties for non-compliance. Board members are appointed by the Tribal Council, with no more than four of the seven members being enrolled members of the Tribes. Board action is subject to review by the Tribal Council, with final review authority vested in the Tribal Court.

(B) Factual Background

Fully half of Flathead Lake from near Dayton on the west to Yellow Bay on the east lies within the exterior boundaries of the Flathead Reservation. Peninsulas, bays, inlets, and islands combine to form over 45 miles of shoreline within these boundaries. Most of the lands riparian to the lakeshore are now owned in fee by non-Indians on which many maintain summer or year-round homes. The State of Montana owns lands riparian to the lake which it uses for public beaches and for research by the University of Montana. The cities of Polson and Dayton abut the lake, and numerous commercial establishments dot the shoreline.

In 1967 the Namens purchased a marina located in Polson, Montana, on lands riparian to Flathead Lake.

Since at least 1946 the marina has been located at this site, and in furtherance of this business docks, wharves, piers, and a storage shed were built which extend into Flathead Lake below high water mark. In 1973 the Namens built an L-shaped breakwater which extends 340 feet into Flathead Lake from high water mark and runs parallel to the shoreline for 240 feet. It is of rock filled construction trapozoidal in shape, with a base approximately 40 feet wide, a top 10-15 feet wide, and an average height of 10 feet. Floating wooden docks are attached to the two protected walls of the breakwater. Although the breakwater, wharves, docks, and storage shed all extend beyond high water mark, none of these structures extend so far into the lake as to reach navigable water for the average boating craft when the lake is at low water.[58]

The City of Polson owns two large docks, each extending several hundred feet into Flathead Lake, several smaller boating docks, a diving platform anchored by wooden pilings and concrete boating ramps, all of which rest upon the bed or banks of Flathead Lake. Wooden

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[58]The water level on Flathead Lake is regulated by the Montana Power Company at its Kerr Dam project pursuant to a Federal Power Commission license issued May 23, 1930. As amended July 17, 1936, the license allows Montana Power to regulate Flathead Lake between elevations 2883 and 2893. See Agreed Statement of Facts [Proposed], Doc. No. 214, Namen's Exhibit F. (F. P. C. License No. 5). Although as regulated the high water mark on the Lake is approximately 2893.2 feet, the lake waters are at that mark only ten weeks a year. Most crafts on the lake draw about four feet of water; thus, the lake becomes navigable at a distance from high water mark where the water depth reaches four feet. This distance varies. At low water (ten feet below 2893.2 feet) at the Namens' marina, the distance from high water mark to obtain four feet of water depth is approximately 450 feet. Answers to Interrogatories 3 (Doc. No. 161).

pilings placed at intervals in the lake are used to separate a swimming area from boating traffic.

The Namens, Montana, and Polson have refused to obtain tribal permits for their structures that extend into Flathead Lake as required by Ordinance 64A (Revised).

(C) Contentions

The Tribes claim that non-Indian as well as Indian riparian landowners within the Reservation boundaries are subject to the terms of Ordinance 64A (Revised). They base their authority to regulate riparian development along the South Half of Flathead Lake upon a two-fold argument: (1) federal common law recognizes that common law riparian rights are subject to local legislative control; and (2) the Tribes either through their inherent sovereignty over their lands as confirmed in the Treaty of Hell Gate or by virtue of the authority vested in them by Congress in the Indian Reorganization Act have the authority to exercise the local control envisioned by federal common law.

The Namens, Montana, and Polson contend that the Tribes have no jurisdiction to regulate their federal common law riparian rights of access and wharfage to the navigable water of Flathead Lake. Although federal case law does refer to local control, they argue it is control by the State which is intended. They assert that the Tribes have no authority, inherent or derived from Congress, to regulate non-Indian owned riparian rights for four reasons: (1) the tribes do not own any rights in the bed of Flathead Lake; (2) assuming the United States does hold the bed and banks of the South Half of Flathead Lake in trust for the Tribes, their interest terminates at the low-

water mark of all fee patented lands;[59] (3) the opening of the Flathead Reservation to settlement by non-Indians "diluted" the Tribes' interest and control over the lake bed; consequently, to the extent riparian lands are now owned by non-Indians, jurisdiction over those riparian lands, including the riparian rights which adhere thereto, have been ceded to the State of Montana; and (4) the Tribes have no jurisdiction to control non-Indian activities or to regulate non-Indian structures on fee patented lands riparian to Flathead Lake.[60]

(D) Local Control of Navigable Waters

The Tribes assert that subject to the superior authority of the federal government to control navigation, some other governmental authority, in this instance the Tribes, also has authority to regulate riparian rights, citing *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 418 (1926); *Shively v. Bowlby*, 152 U. S. 1, 40 (1894); and *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497 (1871).

Yates involved the question of whether the City of Milwaukee could by ordinance declare a wharf owned by Yates to be an obstruction to navigation and a nuisance, and order it to be abated. The wharf extended from riparian land owned by the Yates 190 feet into the Milwaukee River to a point where it reached navigable water.

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[59]These two contentions have been resolved in Part II, *supra*. The court is reaffirming its decision in *Namen I* that the United States holds the beds and banks of the South Half of the Lake from high water mark in trust for the Tribes.

[60]The Namens, Montana, and Polson assert, and the Tribes deny, that Montana and its political subdivisions have power to regulate riparian development along the South Half of Flathead Lake. All parties recognize, however, that the existence of this power is not directly in issue in this case.

The Court held that regardless of whether Yates' title extended beyond the dry land, he was entitled to the rights of a riparian proprietor whose land was bounded by a navigable stream. Among those rights "are accesses to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be".[61]

In *Shively* the plaintiff brought suit to quiet title to lands below the high-water mark of the Columbia River in Oregon. The plaintiffs claimed title from the State of Oregon; the defendants claimed title from the United States through a conveyance made prior to Oregon becoming a state. The Court held that the conveyance of land riparian to the Columbia River by the United States did not pass title to the adjacent lands below high-water mark. Title to that portion of the river bed in dispute was held in trust by the United States and passed to Oregon upon its becoming a state. The title and rights of riparian landowners in the land below the high-water mark of navigable waters were governed by the local laws of the state, subject to the rights granted to the United States by the Constitution.

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[61]The Court further held that the riparian rights are valuable property rights which, though they must be enjoyed in due subjection to the rights of the public, cannot be arbitrarily or capriciously destroyed or impaired. The Court determined that the City's "mere declaration" that Yates' wharf was an encroachment or obstruction did not make it so and enjoined the City from interfering with the wharf.

In so holding the Court relied, *inter alia*, upon *Atlee v. Northwestern Union Packet Co.*, 88 U. S. (21 Wall.) 389 (1875). In *Atlee* the defendant had built a stone pier extending into the navigable portion of the Mississippi River for his sole use as part of a boom for saw-logs in his lumbermill business. When Northwestern Union Packet Co.'s barge struck the pier and sank, Northwestern brought a libel action in admiralty court for damages. The Supreme Court recognized the power of the state, or, when delegated, of the local government, to control the location, erection and use of wharves and landings to prevent their being obstructions to navigation. There was no "claim or pretense" that Atlee's pier was an aid of navigation. The Court specifically rejected Atlee's contention that where a riparian owner "can make such a structure useful to his personal pursuits of business, he can, without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed".

In *River Rouge* the United States sought to condemn land bordering the Rouge River, in Michigan, in order to widen and open the river to accommodate the largest freighter traffic upon the Great Lakes. At issue was the correctness of certain jury instructions relating to the benefit riparian owners would receive from the widening of the channel. The Supreme Court noted that "in the absence of a controlling local law otherwise", a riparian owner has "a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by pub-

lic law, may construct landings, wharves, or piers for this purpose." *Id.* at 418. The Court recognized, however, that this right is "subordinate to the public right of navigation and to the general rules and regulations imposed for the protection of such public right". In the exercise of the "absolute power of Congress over the improvement of navigable rivers", Congress "may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution", but "it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." *Id.* at 419.[42]

To the extent that these cases recognize that riparian rights are subject to local control, the Tribes may have the power to regulate Indians' riparian rights on navigable waters within the reservation for the purpose of regulating navigation. These rights may also be subject to regulation for purposes of protecting other interests of the Tribes normally associated with the exercise of a governmental entity's police power, such as environmental protection. In and of themselves, however, these cases do not extend the Tribes' regulatory power to non-Indian riparian landowners. But the Tribes contend that their inherent tribal sovereignty or the power extended to them under the Indian Reorganization Act allows them to regulate the non-Indian riparian landowners' federal common

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[42]See also *Martin v. Standard Oil Co.*, 198 F. 2d 523, 526 (D. C. Cir. 1952); *United States v. Belt*, 142 F. 2d 761, 767 (D. C. Cir. 1944); *United States v. Groen*, 72 F. Supp. 713, 720-21 (D. D. C. 1947).

law rights to access and wharfage to the navigable waters of Flathead Lake.

(E) Indian Sovereignty

The Tribes base their authority to apply Ordinance 64A (Revised) to non-Indians within the Reservation upon their inherent sovereignty to regulate their people and their territory as recognized in the Treaty of Hell Gate. They describe their inherent sovereignty as "a power possessed by all tribes on their reservations except where it has been taken away from them specifically by treaty or act of Congress". They contend they have power to control any use of their property "so long as the use has not been specifically sanctioned by the federal constitution or statutes".

The Namens, Montana and Polson argue that judicial recognition of inherent tribal sovereignty occurs most broadly in situations which involve tribal authority over tribal members within the original confines of a reservation.[63] Beyond that, the Supreme Court is "deferential" to Indian jurisdiction where Congress has specifically delegated legislative authority over non-Indians to Indian tribes[64] and is "protective" of Indian sovereignty in areas in which state activities or regulatory powers interfere with tribal rights of self-government.[65] Based upon two

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[63]Citing *Santa Clara Pueblo v. Martinez*, 436 U. S. 49 (1978); *United States v. Wheeler*, 435 U. S. 313 (1978).

[64]Citing *United States v. Mazurie*, 419 U. S. 544 (1975).

[65]Citing *Williams v. Lee*, 358 U. S. 217 (1959); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan v. State Tax Comm'n*, 411 U. S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973); *Fisher v. District Court*, 424 U. S. 382 (1976).

recent Supreme Court decisions, they conclude that "absent specific congressional ratification and approval," Indian tribes have neither criminal nor civil jurisdiction over non-Indians, citing *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978), and *United States v. Wheeler*, 435 U. S. 313 (1978).

In *Oliphant* the Suquamish Tribe, based solely upon its retained inherent powers of government, claimed criminal jurisdiction over a non-Indian for violation of tribal criminal laws occurring within the exterior boundaries of the Port Madison Indian Reservation. Because it found the exercise of criminal jurisdiction by Indian tribes over non-Indians to be inconsistent with the status Indian tribes assumed when they announced their dependence on the federal government, the Court held that the Suquamish Tribe was precluded from trying non-Indians in tribal court for violations of tribal criminal law. 435 U. S. at 210. In *Wheeler* the Court focused upon the powers of the Navajo Tribe to prosecute a tribal member for an offense committed on the Navajo Indian Reservation. The Court found this power to be part of the Navajos' primeval sovereignty. Neither treaty nor statute had taken away this power; nor was it implicitly lost by virtue of the Tribe's dependent status. 435 U. S. at 328. In *Oliphant* and *Wheeler* the Supreme Court made clear that Indian tribes retain those sovereign powers which have not been limited by treaty or statute and which are not inconsistent with the tribes' dependent status. *Oliphant*, 435 U. S. at 208; *Wheeler*, 435 U. S. at 323.[46]

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[46] In *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 172 (1973), the Court noted that modern cases tend to

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The parties are in disagreement with respect to the purpose and effect of Ordinance 64A (Revised). The Tribes contend that the Ordinance is merely an attempt to regulate tribally owned land, that is, the bed and banks of Flathead Lake. The Namens, Montana, and Polson argue that as the Ordinance affects them it is an attempt to regulate non-Indians' use of their fee-patent land.

At one time all of the land within the boundaries of the Flathead Reservation, as described by the Treaty of Hell Gate, was of course tribally owned. The power of the Tribes to regulate the use of this land was an attribute of their original sovereignty. See *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, No. C 77-882M (W. D. Wash. July 27, 1978), 5 Indian Law Rptr. F-153; see also 55 Interior Dec. 14, 50, 55 (1934).[67] Pursuant to the Flathead Allotment Act of 1904, *supra*, and the Villa Sites Act of 1910, 36 Stat. 296-297,[68] however,

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avoid reliance on "platonic notions of Indian sovereignty", instead relying on a federal pre-emption analysis. This approach, which the Court uses in identifying the limits of state jurisdiction over reservation Indians, is inapplicable in instances in which an Indian tribe asserts jurisdiction over non-Indians and non-Indian owned property within a reservation.

[67]In this opinion the Solicitor of the Interior Department enumerated powers vested in Indian tribes or tribal councils prior to adoption of the Indian Reorganization Act. Among them was the power of an Indian tribe in "its capacity as a sovereign, and in the exercise of local self-government," to exercise "powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress". 55 Interior Dec. at 55.

[68]The Villa Sites Act allowed the lands fronting on Flathead Lake which were of little agricultural value, to be subdivided

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lands riparian to Flathead Lake came into non-Indian ownership. Concommitant with that ownership were federal common law riparian rights of access and wharfage to the navigable portions of Flathead Lake. See *Namen I, supra,* at 466. In jurisdictions in which the doctrine of riparian rights prevails, riparian rights, such as the right to the use of water in its natural flow, are not mere easements or appurtenances running to the riparian land. Those rights are "inseparably annexed to the soil itself," and pass with it. *Pine v. City of New York,* 112 F. 98, 103 (2d Cir. 1901), *rev'd on other grounds,* 185 U. S. 93 (1902); *Saunders v. Bluefield Waterworks & Imp. Co.,* 58 F. 133, 137 (W. D. Vir. 1893), *rev'd on other grounds,* 63 F. 333 (4 Cir. 1894). In the same way riparian rights of access and wharfage are "inseparably annexed" to the land riparian to Flathead Lake. Whether the Tribes may now regulate non-Indians' riparian rights of access and wharfage to the South Half of Flathead Lake depends upon whether the applicable treaties or statutes have limited the Tribes' exercise of that power, and whether the Tribes' exercise of that power over non-Indian riparian landowners is inconsistent with the Tribes' dependent status.

In resolving this question, as with the other issues, it is recognized that while a court must not change the express terms of a treaty or statute, where doubtful expressions exist they must be resolved in favor of the Indians. *McClanahan,* 411 U. S. at 174. At the same time treaties and statutes are not to be interpreted in isola-

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into small lots to be sold as summer residence sites. See Report of the Committee on Indian Affairs on Senate Bill 3983, Sen. Rep. No. 17, 61st Cong., 2d Sess. (1910).

tion but must be read in light of the "common notions of the day and the assumption of those who drafted them". *Oliphant*, 435 U. S. at 206. The applicable treaties and statutes will be considered in the light of these principles.

(1) Treaty Provisions

In 1855 the various tribes which were to settle upon the Flathead Reservation were parties to two treaties: the Treaty of Hell Gate, 12 Stat. 975, and the Treaty of the Upper Missouri, 11 Stat. 657. In the treaty of Hell Gate the tribes ceded to the United States a large portion of their aboriginal homelands, but reserved a portion as a reservation for their exclusive use and occupancy. Nothing in the Treaty expressly limited the power of the Tribes to regulate the use of their land. Indeed under the Treaty white men could reside upon the Reservation only with the consent of the confederated tribes and the superintendent and agent of the reservation. The Treaty did authorize the federal government, when necessary for the public convenience, to construct roads through the reservation upon which the citizens of the United States had the right to travel. Also the confederated tribes acknowledged their dependence upon the Government of the United States, promised to be friendly with all United States citizens and to commit no depredations upon their property. None of these provisions, however, may reasonably be construed as limiting the power of the Tribes to control the use of their reserved land.

Nor can any provision of the Treaty of the Upper Missouri be so construed. Among other purposes this Treaty was intended to bring peace among the various tribes inhabiting the Northern Rocky Mountain region by

establishing designated hunting areas. By this Treaty the tribes also agreed that "citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them", and the United States bound itself "to protect said Indians against depradation and other unlawful acts which white men residing in or passing through their country may commit". In return the tribes agreed that the United States could construct roads through their respective countries and that "the navigation of all lakes and streams shall be forever free to citizens of the United States". Although these treaties did allow non-Indians to enter and live in the Reservation, that incursion was of a very limited nature. The treaties did not provide for non-Indian ownership of reservation lands. They cannot reasonably be construed as limiting the Tribes' control of their reservation lands.

(2) Statutes Affecting Flathead Reservation

Subsequently to the establishment of the Flathead Reservation Congress passed numerous statutes which directly or indirectly affected the Reservation, including the General Allotment Act of 1887, Flathead Allotment Act of 1904, and the Villa Sites Act of 1910. Most significant is the Flathead Allotment Act. This legislation, contrary to the wishes of the confederated tribes, opened the reservation to settlement by non-Indians.[69] Although it did not expressly limit the power of the Tribes to control the use of their land, it did have the effect of removing reservation lands from tribal and individual Indian ownership. In my opinion this transfer of land to non-Indian

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[69]See *supra*, Part III.

ownership implicitly divested the Tribes of the power to impose tribal land use regulations upon both the land transferred to non-Indian ownership and the federal common law rights of access and wharfage that were "annexed" to that land.

Oliphant and *Wheeler* held that Indian tribes no longer retain those sovereign powers the exercise of which is inconsistent with their dependent status. *Oliphant,* 435 U.S. at 208; *Wheeler,* 435 U.S. at 323. While Indian tribes that have preserved their tribal relations retain a "semi-independent" position, they do not have the status of a state or nation.

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one of the other of these.

Oliphant, supra, 435 U.S. at 211, quoting from *United States v. Kagama,* 118 U.S. 375, 379 (1886). The sovereign powers Indian Tribes do retain are those powers necessary to regulate their "internal and social relations" so far as "not brought under the laws of the Union or of the State within whose limits they reside." *United States v. Kagama, supra.* Among these powers are: the power to prescribe laws applicable to tribal members and to enforce those laws by criminal sanctions;[70] to determine

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[70] *United States v. Antelope,* 430 U. S. 641, 643, n. 2 (1977); *Talton v. Mayes,* 163 U. S. 376, 380 (1895); *Ex parte Crow Dog,* 109 U. S. 556, 571-72 (1883); see 18 U. S. C. § 1151 (1976).

tribal membership;[71] to regulate domestic relations among tribal members;[72] and to prescribe rules for the inheritance of property.[73] See *United States v. Wheeler, supra,* 435 U. S. at 322, and n. 18. The sovereign powers they no longer retain are those lost by virtue of their dependent status, those which involve the relations between an Indian tribe and non-members of the tribe. Among these are the power to freely alienate to non-Indians the land they occupy;[74] to enter into direct commercial or governmental relations with foreign nations;[75] and to try nonmembers in tribal courts.[76] See *Id.,* at 326.

Wheeler explains the reason for this loss of sovereign powers: the dependent status of Indian tribes within the territorial jurisdiction of the federal and state governments is necessarily inconsistent with their freedom independently to determine their *external* relations. 435 U. S. at 326. I conclude that the power to regulate non-Indians' riparian rights is a matter which affects the Tribe's external relations. Once the lands riparian to

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[71] *Cherokee Intermarriage Cases,* 203 U. S. 76 (1906); *Roff v. Burney,* 168 U. S. 218, 222-23 (1897).

[72] *Fisher v. District Court,* 424 U. S. 382 (1976).

[73] *Jones v. Meehan,* 175 U. S. 1, 29 (1899); *United States ex rel. Macbey v. Coxe,* 59 U. S. (18 How.) 100 (1856).

[74] *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 667-68 (1974); *Johnson v. M'Intosh,* 21 U. S. (8 Wheat.) 543, 574 (1823).

[75] *Worchester v. Georgia,* 31 U. S. (6 Pet.) 515, 519 (1832); *Cherokee Nation v. Georgia,* 30 U. S. (5 Pet.) 1, 17-18 (1831); *Fletcher v. Peck,* 10 U. S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring).

[76] *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 191.

Flathead Lake went out of Indian ownership the Tribes lost the power to regulate the riparian rights that were part of that riparian land.

(3) Legislative and Executive Presumptions

In determining whether Indian tribes had the power to try non-Indians, the Supreme Court also examined the presumptions of Congress, the Executive Branch, and the lower federal courts, noting that they carried considerable weight. *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 206. None of these sources has conclusively found that Indian Tribes have the power to regulate non-Indian owned fee-patent land.

Congress has only briefly considered the question of the power of Indian tribes to regulate non-Indian owned land within a reservation, and its deliberations have been inconclusive. In 1973 and 1974 Congress debated legislation which would have encouraged states and Indian tribes within the states to adopt and coordinate land use programs. See Land Use Policy and Planning Assistance Act, S.268 and S.924, S. Rep. No. 93-197, 93d Congress, 1st Sess. (1973); Land Use Planning Act of 1974, H. R. 10294; H. R. Rep. No. 93-798, 93d Cong., 2d Sess. (1974). Among other things these bills authorized the Secretary of the Interior to award grants to any Indian tribe for developing a land use program for reservation and other tribal lands. The Senate and the House of Representatives, however, took divergent views of the power of the Indian tribes to impose *tribal* land use programs upon non-Indian owned land within the reservations. Borrowing from 18 U. S. C. § 1151 (1976), the Senate version defined "reservation and other tribal lands" to include "all lands within the exterior boundaries of any Indian reservation, not-

withstanding the issuance of any patent, and including rights-of-way, and all lands held in trust for or supervised by any Indian tribe". Land use Policy and Planning Assistance Act, § 601(g). Realizing that Indian tribal land use planning processes and programs would be "largely meaningless" if the tribes could not control key tracts within their reservations which they did not own, the Senate intended this definition to "eliminate pockets of fee-patented land inside Indian reservations which might otherwise be subject to laws different from their surroundings". S. Rep. No. 93-197, *supra*, at 127. Although the House adopted a similar definition in its version of the bill, Land Use Planning Act of 1974, § 412(e), it seriously questioned the power of Indian tribes to impose tribal land use programs on non-Indian owned land within a reservation and called for a task force study of the issue. *Id.* at Title II; H. R. Rep. No. 93-798, at 38-41. In the end, neither bill passed Congress.

In 1974 Congress established the American Indian Policy Review Commission which it charged with the responsibility of Investigating, *inter alia*, tribal governmena and federal, state and tribal jurisdiction. Act of January 2, 1975, P. L. No. 93-580, 88 Stat. 1919, 2 U. S. Code Cong. § Admin. News 2194 (1974). In a 1976 task force report submitted to Congress, the Commission concluded that although the question of whether Indian tribes may zone and regulate the use of fee patent land within a reservation had not been addressed by the Supreme Court, case law "strongly supports" the proposition that tribes did have this power. The report's conclusion was based upon a two-pronged analysis: what powers Indian tribes could exercise as incidents of their sovereignty; and

where these powers could be exercised. Proceeding upon the belief that all powers not "explicitly" taken from the tribe resided with the tribe, the report concluded that Indian tribes retained the sovereign power to zone and regulate land use. This power could be exercised over fee patent land which retained "reservation status" after the opening of the reservation land to settlement and the patenting of that land. Final Report to the American Indian Policy Review Commission, Task Force Two; Tribal Government 197-98 (1976). The conclusion of the task force preceded the Supreme Court's rulings in *Oliphant* and *Wheeler* that Indian tribes no longer retain those sovereign powers that are inconsistent with their dependent status. *Oliphant*, 435 U.S. at 208; *Wheeler*, 435 U.S. at 323. Nor has Congress acted upon these conclusions of the task force report.

None of the volumes of documents from the various departments within the Executive Branch considers the question of the Tribes' power to regulate non-Indian owned fee-patent land within the Reservation. Nor has this question apparently yet been faced by the Supreme Court or any of the courts of appeal. In the only district court opinion found relating to this matter the district court held that the Muckleshoot Indian Tribe could not impose tribal land use regulations upon non-Indian owned land within the geographical boundaries of the Muckleshoot Indian Reservation. *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, supra.* The court concluded that in light of *Oliphant, supra,* the tribe did not have jurisdiction "to regulate the activity of those outside the tribal community absent affirmative delegation of such power by Congress".

The cases which the Tribes cite in support of their argument that they have retained sovereign powers to regulate non-Indian landowners' use of riparian rights are distinguishable. In the instant case the non-Indian landowners are exercising riparian rights which have their basis in federal common law and which were part of federal grants of land. The cases upon which the Tribes rely involve either powers that were expressly given to Indian tribes by statute, or uses of tribal property without a federal right.

Chief among these cases is *United States v. Mazurie*, 419 U.S. 544 (1975). In 1953 Congress passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian Country, as long as state law was not violated. Pursuant to this statute the Indian tribes of the Wind River Reservation in Wyoming refused to renew a tribal liquor license previously held by the Mazuries to operate a bar they owned on fee-patent land within the reservation. Although Congress itself had the authority to regulate the distribution of alcoholic beverages within Indian country, the Mazuries challenged the delegation of that authority to an Indian tribe. The Court upheld the delegation to the Indian tribes, noting that the limits on the authority of Congress to delegate its legislative powers were less stringent where the entity exercising the authority possessed independent authority over the subject matter. *Id.* at 556-57. Although the Court noted that Indian tribes are "unique aggregations" which possess "attributes of sovereignty" over their members and their territory, it did not hold that this sovereignty by itself would have been sufficient to sustain the tribe's

regulatory authority over non-Indians within the reservation.

Other cases have held that Indian tribes retained the power to tax non-Indians who lease tribally owned lands or lands owned by individual tribal members, *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (8 Cir. 1958), *cert. denied*, 358 U. S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8 Cir. 1956). These courts found that the power to tax was an inherent aspect of tribal sovereignty which had not been limited by any federal statute. The basis of imposing the tax upon non-Indians, however, was their lease agreement for the use of tribal resources. In *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D. S. D. 1975), the district court held that the Rosebud Sioux tribal court had personal and subject matter jurisdiction over the plaintiffs, nonmembers of the tribe, in a suit which the Tribe had brought in tribal court for plaintiffs' violation of a lease agreement with the Tribe. Subject matter jurisdiction was predicated upon the lease of tribally owned property and personal jurisdiction upon a stipulation to the jurisdiction of the tribal court contained in the lease agreement.

These cases emphasize that Indian tribes retain sovereign powers necessary to regulate their "internal and social relations". When non-Indians enter into transactions with an Indian tribe or tribal members for the use of tribal resources, for instance, this necessarily involves the power of the tribe to regulate its internal affairs. Here, however, the non-Indian riparian landowners are not using tribal resources pursuant to a permit or contractual agreement with the Tribes. They are exercising rights they acquired under federal law—riparian rights

of access and wharfage to the navigable water of Flathead Lake. When Congress opened the Reservation to settlement by non-Indians, it implicitly divested the Tribes of the authority to regulate non-Indians' use of these riparian rights.

(F) Indian Reorganization Act

The Tribes rest their power to enact Ordinance 64A (Revised) upon their Tribal Constitution and Bylaws. Article VI of that constitution provides:

> Section 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws;
>
> (a) To regulate the uses and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to protect the health, security, and general welfare of the Confederated Tribes.
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> • • •
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> (n) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the Confederated Tribes by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior.
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> • • •
>
> (u) To adopt resolutions or ordinances to effectuate any of the foregoing powers.

Adoption of the Tribes' Constitution and Bylaws was authorized by the Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. §§ 461 et seq. The IRA was an attempt by Congress "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically". *Morton v. Mancari*, 417 U. S. 535, 542 (1974). See also *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 152 (1973); *United States v. State Tax Comm'n*, 535 F. 2d 300, 306 (1976). The key provisions of the Act were section 16, which permitted Indian tribes to organize and adopt a constitution and bylaws, and section 17, which permitted Indian tribes to incorporate. 25 U. S. C. §§ 476 and 477. In addition to all powers vested in any Indian tribe or tribal council by prior law, section 16 provided that tribal constitutions should also vest in them the power "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe". Section 17 allowed charters of incorporation to convey to the incorporated tribe the power "to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description". The Tribes organized pursuant to section 16, adopted a constitution and bylaws, subsequently approved by the Secretary of the Interior, and incorporated pursuant to section 17.

The Tribes contend that in passing the IRA Congress expressly gave them authority to regulate riparian rights on the South Half of Flathead Lake. The Namens, Montana, and Polson argue that although Congress intended the IRA to promote Indian self-government, neither section 16 nor 17 was intended to expand Indian authority over non-Indians.

The IRA provided that tribal constitutions could contain all powers vested in a tribe or tribal council by prior law plus the power to prevent the "sale, disposition, lease, or encumbrance" of tribal lands without tribal consent. This is far from an express authorization to regulate non-Indians' riparian rights. Although an opinion by the Solicitor of the Interior Department identified the right to regulate tribal land as a power vested by prior law, it did not expressly consider a tribe's power to regulate non-Indian owned rights. 55 Interior Dec. at 55.[77] The power expressly granted by § 16 of the IRA was to *prevent* the sale, disposition, lease or encumbrance of *tribal lands*, not to regulate non-Indians' riparian rights.

The Tribes have not cited any case which has interpreted the IRA as extending Indian regulatory authority over non-Indians. Compare *Trans-Canada Enterprises, Ltd. v. Muckelshoot Indian Tribe, supra.* Nor do the express terms of the Act reveal such a power. I therefore conclude that the IRA provides no basis for tribal regulation of non-Indians' riparian rights.[78]

(G) United States v. State of Montana

In *United States v. State of Montana, supra,* the court held that (1) title to the bed and banks of the Big Horn River to ordinary high water mark situated within the

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[77]See *supra,* n. 66. The conclusions of the Solicitor must be re-evaluated in light of *Oliphant's* holding on implicit divestiture of sovereign powers.

[78]The Tribes argue that if necessary Ordinance 64A (Revised) may be viewed as an exercise of Congressionally delegated authority. No Congressional statute, however, has authorized such a delegation. Compare *United States v. Mazurie, supra.*

exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the use and benefit of the Crow Tribe; (2) the Crow Tribe has power to regulate hunting and fishing on the Crow Reservation by nonmembers of the Crow Tribe, subject to specified limitations. The Tribes argue that this case supports their contention that the Tribes have the right to regulate riparian rights of non-Indians. I have recognized in Part II that *United States v. Montana* supports the position of the Tribes and the conclusion of this court that the United States holds title to the bed and banks of the South Half of Flathead Lake to high water mark in trust for the Tribes. I cannot agree, however, that it is persuasive with respect to the Tribes' contention that they have the right to regulate riparian development of Flathead Lake on non-Indian lands.

In *United States v. Montana*, the court reaffirmed its holding in *United States v. Finch*, 548 F. 2d 822 (9 Cir. 1976), vacated on other grounds, 433 U. S. 676 (1977) that under treaty provisions, "augumented (sic) by 18 U. S. C. § 1165, which makes going on Indian land to hunt or fish without permission a criminal offense, . . . 'the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law.' 548 F. 2d at 834." 604 F. 2d at 1167. The court expressly recognized, however, that the sovereignty of the Crow Tribe was limited, quoting from *United States v. Wheeler, supra*, 435 U. S. at 322: "It exists only at the sufferance of Congress and is subject to complete defeasance". *Id.* at 1170. The court quoted also the excerpt from *Oliphant v. Suquamish Tribe*, 435 U. S. at 211, quoted *supra* at page

50. The following observation in *United States v. Montana,* is particularly applicable in this case.

> We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, *viz,* commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

Id. at 1169.

All of the parties agree that a unique situation is presented. As noted *supra,* nearly all of the land riparian to the shore of Flathead Lake are now owned by non-Indians, on which many maintain summer or year round homes. Flathead Lake is approximately 26 miles long and five miles in width at its widest point. It is the largest body of fresh water in the Continental United States west of the Great Lakes. The beds and banks of the South Half of the Lake are held by the United States in trust for the Tribes. The beds and banks of the North Half are owned by the State of Montana. The State also owns land on the South Half of the Lake used for public beaches and research by the University of Montana. The City of Polson abuts the South Half of the Lake, and numerous commercial establishments are located on the Lake. Under the Villa Sites Act of 1910, it was contemplated that all of the unallotted lands fronting on the South Half of the Lake would be subdivided and sold, and circulars issued

by the Department of the Interior stated that the Lake "is utilized for bathing, sailing, boating, and yachting, and several steam boats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves". *Namen I*, 380 F. Supp. at 463.[79]

In my opinion there is a clear distinction between the regulation of hunting and fishing pursuant to treaty and statutory provisions and the regulation of riparian rights on lands patented by the United States without reservation or restriction, at a time when it was contemplated that all unallotted lands bordering on the lake would be sold. The rules set forth in *Wheeler* and *Oliphant, supra,* are still persuasive in concluding that there has been an implied divestiture of tribal jurisdiction. See also discussion of the effect of *Wilson v. Omaha Indian Tribe, supra,* Part II, page 13.

V. Federal Statutory Law and Regulations

(A) Federal Water Pollution Control Act

The Tribes contend that the Namens and City of Polson are in violation of the Federal Water Pollution Con-

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[79]As noted in *Namen I*, "It is significant also that for more than half a century the defendants and other riparian owners, with the full knowledge of the Federal Government and the Tribes and without objection from either, expended large sums of money for docks and wharves abutting their lands on the south half of Flathead Lake. Many persons built and maintain homes and business enterprises. Wharves and piers were constructed, boats and ships plied their way through the area, and commerce was carried on." *Id.* at 466.

trol Act (FWPCA), 33 U.S.C. §§ 1251 *et seq*,[80] because they have failed to obtain the permit required by the Act for discharge of dredging and fill material. In the order of December 10, 1979, counsel were invited to file supplemental briefs on the effect of the FWPCA and regulations issued pursuant thereto. Supplemental briefs on this issue were filed by the Tribes, Namen and Montana, and Polson. The United States stated in its brief that it would not "address the impact of the Federal Water Pollution Control Act and the regulations promulgated thereunder because the United States did not allege a violation of that Act in its complaint".

Namens and Montana contend that the Tribes cannot rely on the FWPCA because (1) they have not satisfied the jurisdictional "notice" requirements of the Act, and (2) the Namen structures did not require a permit. The City of Polson contends that its structures were all completed before the passage of the FWPCA and no permit accordingly was required.

The purpose of the FWPCA is to eliminate the discharge of all pollution into navigable waters by 1985. 33 U.S.C. § 1251. To achieve this end, persons are not allowed to discharge material into navigable waters without first obtaining a permit from the Corps of Engineers. 33 U.S.C. § 1344. Pursuant to this congressional mandate, the Corps of Engineers has promulgated rules and regulations. 33 C.F.R. Part 323 (1979). Under these

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[80]As amended Dec. 27, 1977, Pub. L. 95-217, 91 Stat. 1567, the Act is cited as the "Clean Water Act of 1977". As amended Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816, the Act was cited as the "Federal Water Pollution Control Act Amendments of 1972."

regulations a "discharge" of fill materials includes essentially any "additions of fill material into waters of the United States", regardless of its purpose. § 323.2(n). The regulations require an individual permit for all fills made prior to July 25, 1975, § 323.3(a)(1), except for certain clearly defined categories of structures or fills "which cause only minimal adverse environmental impact. . . ." § 323.3(c)(1). The District Engineer is authorized to issue "general permits" for these exempted categories of structures.

(1) Notice Requirements of FWPCA

33 U. S. C. § 1365(a) provides that "[e]xcept as provided in subsection (b) . . . , any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . 33 U. S. C. §§ 1251-1376. . . ." § 1365(b) reads:

> (b) No action may be commenced—(1) under subsection (a)(1) of this section—(A) prior to 60 days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

§ 1365(e) provides, however, that § 1365 does not "restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

The Tribes have not alleged or shown that they have given the notice required by § 1365(b).[81] No notice was given Namens, the State of Montana or the City of Polson prior to filing this action. There is no evidence that notice was ever given the Administrator of the Environmental Protection Agency of any alleged violation.[82] 40 C. F. R. Pare 135 (1979) sets the procedures for filing a notice of a violation. The Tribes have not attempted to comply with them.

The legislative history of § 1365 indicates that proper notice to the agency is a prerequisite to a citizen suit. The Senate Report reads in part:

> In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve a notice of intent to file such action on the Federal and State water pollution control agency and the alleged polluter. . . .
>
> The Committee has provided a period of time after notice before a citizen may file an action against an alleged violator [to] . . . give the administrative enforcement officer an opportunity to act. . . .

S. Rep. No. 92-414, 92 Cong., 2nd Sess. (1972), 1972 U. S. CODE CONG. & AD. NEWS 3745. It is apparent from these statements that Congress intended to give the agency

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[81] Nor is there any specific reference to the FWPCA in any of the pleadings. Count VII of the Tribes' second amended complaint alleges generally that structures erected by Namens "contravene applicable federal statutory laws and the regulations duly promulgated thereunder".

[82] The Administrator referred to in § 1365(b) is the Administrator of the Environmental Protection Agency, who is charged with administering the Clean Water Act. 33 U. S. C. § 1251(d).

an opportunity to require correction of an alleged violation before allowing a citizen to bring a private enforcement suit.

While there is some conflict in the authorities, I am persuaded that under the facts of this case the notice requirement is jurisdictional. In *Massachusetts v. United States Veterans Admin.*, 541 F. 2d 119 (1 Cir. 1976), the court held that it had no jurisdiction where the citizen brought action 40 days after notice rather than 60 days afterward as required by § 1365(b). Relying on the legislative history, the court stated that "the citizen suit provisions . . . were designed to supplement and expedite administrative action to abate violations of the Act. . . . Recourse to the courts is appropriate only when the administrative action taken is less than adequate." *Id.* at 121. The Seventh Circuit followed *Massachusetts* in *City of Evansville v. Kentucky Liquid Recycling*, 604, F. 2d 1008 (7 Cir. 1979).

Moreover, as noted in *Massachusetts v. United States Veterans Admin.*, 541 F. 2d at 121, n. 2, § 1365 was modeled on a similar notice provision in the Clean Air Act Amendments of 1970, 42 U. S. C. § 1857h-2.[83] In *City of Highland Park v. Train*, 519 F. 2d 681 (7 Cir.), *cert. denied*, 424 U. S. 927 (1975), the court held that failure to comply with the Clean Air Act's notice provision is a jurisdictional bar. Citing legislative history, the court stated "that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger

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[83]See also 1972 U. S. Code Congressional & Admin. News, 3745.

governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304." *Id.* at 690-691. The court said further:

> Section 304(b)'s statutory command plainly states that "[no] action *may be commenced* . . . prior to 60 days after the plaintiff has given notice of such action to the Administrator." (Emphasis Supplied). Plaintiff made no attempt whatsover to comply with the notice provision, and their suit therefore could not properly be commenced.

Id. at 691.

In most cases which have held that failure to comply with the notice provisions of § 1365(b) was not jurisdictional, there have been independent sources of jurisdiction so that § 1365(e) became applicable. See, *e.g., Natural Resources Defense Council, Inc. v. Train,* 510 F. 2d 692 (D.C. Cir. 1975), where an environmental group brought an action under § 1365(a)(2) to comper the EPA to publish effluent guidelines called for by the FWPCA. The court concluded that the action was maintainable under either the general federal question statute or the Administrative Procedure Act. The court held that the special citizens suits provisions "do not cut back on federal court jurisdiction over actions that would have been maintainable even in the absence of that special authorization." *Id.* at 702.

This is not an action against the agency under § 1365 (a)(2), but rather an action under § 1365(a)(1), which provides for an action "against any person . . . who is alleged to be in violation of . . . an effluent standard." I find no other common law or statutory basis for the

Tribes' citizen suit to enforce the FWPCA effluent standards of 33 U. S. C. § 1344.

The Tribes argue, however, they have two independent sources of jurisdiction: (1) under 28 U. S. C. § 1331, "the general federal question jurisdiction statute"; and (2) under 28 U. S. C. 1362, which provides that the district court shall have jurisdiction of civil actions brought by an Indian Tribe wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. I find no merit in either contention.

Under the argument advanced by the Tribes, § 1331 would give a citizen the right to sue for the enforcement of any federal statute on the basis that a federal question is involved. To imply that a statute contains a private remedy, however, the court must find an explicit or implicit congressional intent to creat such a right. *Sierra Club v. Andrus*, 610 F. 2d 581, 587 (9 Cir. 1979). Here, the § 1365 citizen action statute expresses a congressional intent to set forth the sole procedures that must be followed to bring a private suit.

Looking to the legislative history of 28 U. S. C. § 1362, the Supreme Court in *Moe v. Salish & Kootenai Tribe, supra*, found "an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." 425 U. S. at 472.[84] The Court concluded also that the "mere fact that

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[84]There is no contention here that the United States as trustee for the Tribes has declined to act or sue on the Tribes behalf.

a jurisdictional statute such as § 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempt from the provisions of § 1341."[85] *Id.* The Tribes likewise are not exempt from the provisions of 33 U. S. C. § 1365. The purpose of 28 U. S. C. § 1362 would not be served by ruling otherwise.

Even assuming *arguendo* that the Tribes have an independent source of jurisdiction, it would still be appropriate for this court to defer any ruling on this issue pending action by the Corps of Engineers. See, *e.g.*, *NRDC v. Train, supra,* 510 F. 2d at 703. That agency is in a better position than this court to determine whether any permit is required and whether there has been any violation of the Act.

(2) Permit Requirements

James M. Namen in his supplemental affidavit of August 22, 1979, states:

> I have inquired of the Corps of Engineers as to whether or not I am required to apply for any permit to do any work on the breakwater or for any of my inwater facilities and have been advised by agents of the Corps of Engineers that no permits are required. I have relied upon those representations.

The Tribes presented no testimony to contradict this statement. The only other evidence with respect to the

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[85] 28 U. S. C. § 1341 prohibits district courts from enjoining the assessment, levy, or collection of any state tax wherein a plain, speedy, and efficient remedy may be had in the state courts. The Court held that § 1362 gave the Tribe the right to bring an action in federal court despite the prohibition of § 1341 since "the United States was not barred by § 1341 from seeking to enjoin the enforcement of the state tax law." *Id.* at 474.

position of the Corps of Engineers is contained in two letters, one written to counsel for Namens, and the other to counsel for the Tribes.

On October 17, 1977, Charles E. Knowlton, Jr., Acting District Counsel of the Corps of Engineers, wrote Namen's counsel:

> Pursuant to your telephone conversation with Mr. Redfield of our office this morning, I am inclosing a copy of our permit pamphlet. Flathead Lake is considered to be "waters of the United States" for purposes of 33 U.S.C. 1344. Discharges of dredged or fill material into the waters of the lake, therefore, come under the purview of that section. It has not been found by the Corps to be "navigable waters of the United States" for purposes of 33 U.S.C. 403. Certain types and sizes of fills are exempt from individual permit requirements, and you will want to pay particular attention to 33 C.F.R. 323 for details in this regard.

In a letter to counsel for the Tribes dated January 17, 1980, Anastasia K. Dritshulas, Acting District Counsel, reaffirmed the position of the Corps of Engineers that it has not asserted jurisdiction over Flathead Lake under Section 10 of the Rivers and Harbors Act of 1899 because the Lake has not been declared a "navigable water of the United States" as defined by 33 C.F.R. Part 322.2(a). The letter also reaffirmed the position of the Corps of Engineers that Department of the Army permits "are required under Section 404 of the Clean Water Act (previously known as the Federal Water Pollution Control Act Amendments of 1972) for the discharge of dredged or fill materials", and that Flathead Lake and the adjacent wetlands are within the coverage of Section 404. The letter continued:

> Accordingly, a Department of the Army permit is required for the discharge of all dredged or fill material into Flathead Lake waterward of the ordinary high water line (OHW) or in the adjacent wetlands.
>
> The Seattle District is actively enforcing its Section 404 jurisdiction under the Regulatory Program of the Corps of Engineers in Flathead Lake and the adjacent wetlands. All permit applications are processed in accordance with 33 CFR Parts 320-329. The policies addressed in the regulations determine whether a permit application will be denied or whether a permit will be issued. As will be noted from a review of the regulations, no one factor is controlling.
>
> In addition, work falling under the coverage of Section 404 of the Clean Water Act which has been accomplished in the Flathead Lake, without a Department of the Army permit, is considered an unauthorized activity as defined by 33 CFR Part 326. Appropriate legal action, as specified by 33 CFR Part 326.4, is taken in these cases.

All of the structures of the City of Polson were in place when the amendments to the FWPCA were passed on October 18, 1972. While most of the Namen structures were then in place, the dock was extended in 1973. Namens argue that the regulations which implemented the 1972 amendments were not adopted until July 19, 1977 (42 F. R. 37133; Sections 320.1 et seq. 33 C. F. R.); and that in April, 1973 there were no regulations requiring a permit.[86]

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[86]Namens contend further that the Namen and Schumacher affidavits "clearly reflect that the use to which that position of Flathead Lake was put after the breakwater and dock were installed were substantially identical to that which had previously existed".

These are questions which should be determined initially by the Corps of Engineers in an appropriate action. It is apparent from the January 17, 1980 letter from the Acting District Counsel that the Corps is "actively enforcing" its jurisdiction under its Regulatory Program "in Flathead Lake and the adjacent wetlands".

(B) Rivers and Harbors Act

As set forth above (Part V, page 38), under section 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 403 (1976), Congress has prohibited any obstruction to the navigable capacity of any waters of the United States not otherwise affirmatively authorized by it, and, in most instances, requires persons to obtain the recommendation of the Corps of Engineers and authorization from the Secretary of the Army before building any structure upon any navigable water of the United States. The purpose of section 10 "is to keep the navigable waters of the United States free from unreasonable obstructions". *Sierra Club v. Andrus*, 610 F. 2d 581, 590 (9 Cir. 1979). "Under section 10 the Corps must consider not only the effect of an activity upon navigation, but also its impact upon the environment." *Id.* at 593. Following a careful analysis of the Supreme Court cases construing the scope of section 10, the court in Sierra Club concluded:

> The federal authority set forth in the Rivers and Harbors Act of 1899 reigns paramount. Congressional deference to traditional state regulation of water rights, a consideration of significance in other contexts, does not operate to restrict the express policy of section 10.

Id. at 600.

Whether a body of water is subject to regulation under the Commerce Clause is a question of fact. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). Title 33 U.S.C. § 403 prohibits obstructing navigability in "any of the waters of the United States. Navigable waters of the United States are defined by the Corps of Engineers as those waters that are "presently used or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce". 33 C.F.R. § 329.4; *accord Appalachian Elec. Power Co., supra; Kaiser Aetna v. United States, supra.* In *Appalachian Electric Power Co.* the Court recognized that the authority of Congress over navigable waters of the United States is not limited to control for the purposes of navigation only, but "is as broad as the needs of commerce". 311 U.S. at 426. In the exercise of its power over a navigable water, Congress may forbid the construction of an obstruction therein or "may grant the privilege on terms". *Id.* at 427.

As noted above, the Corps of Engineers has taken the position that Flathead Lake is not considered to be "navigable waters of the United States" for purposes of 33 U.S.C. § 403 (1976). The United States is a brief filed August 15, 1978, recognizes that, "It is clear that the United States under the Rivers and Harbors Act (Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. 401), has the authority to regulate the riparian right of access on the south half of Flathead Lake." It is recognized further that, "This authority of the United States is primarily exercised by the Corps of Engineers, and the Corps has promulgated regulations pursuant to its statutory authority." In explanation of the failure of the Corps to exer-

cise its authority the brief continues: "However, the Corps does not regulate every navigable waterway in the United States even though it has the authority to do so. The Corps exercises its authority only upon waterways in which it has a direct involvement such as a flood control project, a dam, or if the waterway is used in interstate commerce." The United States argues that the Corps of Engineers does not have the capability to regulate every shoreline of a navigable body of water of the United States and that the Tribes have either an independent or delegated authority to regulate.

Although all of the parties recognize that Flathead Lake is in fact a navigable body of water, none of the parties has expressly questioned the finding of the Corps of Engineers that the Lake is not a navigable water for the purposes of the Rivers and Harbors Act. Accordingly this question is not before the court. I deem it appropriate, however, to suggest that the question of the proper exercise of the authority of the Corps of Engineers under the Rivers and Harbors Act (as well as questions arising under FWPCA) should be determined in an appropriate action.

I recognize, of course, that the Corps of Engineers cannot assume the responsibility of regulating every navigable stream. Here, however, we have a lake 26 miles long and five miles wide, the largest body of fresh water west of the Great Lakes, a tributary of the Columbia River and clearly "susceptible for use in interstate commerce". The Lake has a dam and hundreds of non-Indian riparian landowners (as of October, 1973, there were 1,407 non-tribal docks and/or breakwaters within the south half of the Lake). Hundreds of boats navigate the Lake. The

Corps of Engineers in 1909-1910 dredged a channel within the south half of the Lake.[87] Finally the Corps of Engineers does recognize that Flathead Lake is a navigable body of water under the FWPCA.

I note again that we are also confronted with a unique factual situation, in that the United States holds title to the bed and banks of the south half of the Lake in trust for the Tribes and the State of Montana owns the beds and banks of the north half. In the opinion of this court neither the State nor the Tribes has the authority to regulate the riparian rights of non-Indian landowners on the south half of the Lake in the absence of delegation of this authority by Congress. The parties recognize, as does the court, the inherent difficulty of the court determining on a case by case basis whether various riparian structures constitute an unreasonable inference with the public's and the Tribes' navigational rights. The court lacks the expertise to determine the complex issues involving both navigational and environmental concerns. See *Sierra Club v. Andrus, supra.*

Under section 10 of the Rivers and Harbors Act, the Secretary of the Army, acting upon the recommendation of the Corps of Engineers, should initially determine "what constitutes an unreasonable obstruction". *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929); *Sierra Club v. Andrus, supra,* 610 F. 2d at 590. He should determine

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[87]Pursuant to the Rivers and Harbors Works Appropriation Acts of March 3, (sic) 1909, 35 Stat. 781, 828, and June 25, 1910, 36 Stat. 630, 666, the United States dredged a channel six feet deep and 100 feet wide with a 500 foot turning basin at the shore of Polson Bay. The work was performed by the Army Corps of Engineers.

whether a permit is required for a structure or whether it falls within an exempted category; and if a permit is required, whether a failure to obtain the permit requires removal of the structure or some lesser sanction. If the Corps of Engineers and other governmental officials decline to act, the Tribes would have the right to bring suit. As the court held in *Sierra Club v. Andrus*, "private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of section 10." 610 F. 2d at 592. For further discussion of the authority of the Corps of Engineers to regulate the riparian rights of non-Indians, see *infra* at pages 90 and 91.

VI. Alleged Violation of Riparian Rights

(A) Legal Rights of a Riparian Owner

As this court recognized in Namen I, 380 F. Supp. at 461, the federal common law with respect to the riparian rights of access and wharfage was set forth in *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 418 (1926). The Court said:

> It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, *Shively v. Bowlby*, 152 U. S. 1, 40, he (the riparian owner) has, in addition to the rights common to the public, a property right incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law[23] may construct landings, wharves or piers for this purpose.

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[23]The Court also quoted from *Yates v. Milwaukee, supra*, 10 Wall, at 504: "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."

Riparian structures can be extensive enough to allow vessels to land, find safety while discharging cargo, and depart with ease, subject to the right to control their erection and use to the extent necessary to "prevent their being made obstructions to navigation and standing menaces of danger". *Atlee v. Northwestern Union Packet Co., supra,* 88 U. S. at 389.[89] As the Tribes correctly state, it is the purpose of the structure and not the nomenclature used which determines the permissibility of the structure. *E. g., United States v. 62.61 Acres of Land,* 547 F. 2d 818 (4 Cir. 1977); *United States v. Turner,* 175 F. 2d 644 (5 Cir.), *cert. denied,* 338 U. S. 851 (1949). There is no requirement, however, that the structure be elevated on pilings as piers and wharves often are. The riparian owner may also fill in over the shore to reach the navigable portion of the water. *Turner, supra; accord, 62.61 Acres, supra*; see *Ill. Central R. R. Co. v. Illinois,* 146 U. S. 387 (1892).[90] A riparian owner may even be entitled "to con-

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[89]The Court continued: "Wharves and piers are as necessary, almost, to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there."

The Court found that the structure built by Atlee did not meet these considerations. It was "intended to receive nothing that floats but rafts, and no rafts but such as the owner designs to keep there permanently for his own use".

[90]The Supreme Court in *Illinois Cent. R. R. Co.,* indicated that a riparian owner could permissibly fill in land between the high and low waterline on a lake and then construct piers and wharves for the purpose of access to the navigable point of the waters of the lake.

struct a wharf or pier . . . for the use of others. . . ." *Shively v. Bowlby, supra* at 40; *Weber v. State Harbor Commissioners*, 85 U. S. (18 Wall) 57 (1874).

In *Burns v. Forbes*, 412 F. 2d 995 (3 Cir. 1969), the court considered a riparian owner's right to fill in land. The owner for the purpose of eliminating a mosquito problem filled in a mangrove swamp on the lagoon in front of his property. He contested his neighbor's subsequent building of a fence across the filled land which cut off his access to the lagoon. The court "presumed that the bed of the [lagoon] . . . including that portion reclaimed by the plaintiff, is owned by the United States", *Id.* at 997, and held that the plaintiff had the right to use the filled land for the purpose of access. The court held that this riparian right "is not lightly to be deprived", and exists "to *protect* the right of access and to facilitate its exercise. . . ." *Id.* at 998 (emphasis added). The allowable purpose for a structure was considered broad enough to include a right to construct a landfill to correct the mosquito problem which interferred with the owner's enjoyment of his right to free access.

In *Ketchikan Spruce Mills v. Alaska Concrete Prod. Co.*, 113 F. Supp. 700 (D. C. Alaska, 1953), cited in *Namen I*, the plaintiff purchased littoral land to gain riparian rights in the abutting tide lands. He constructed docks, wharves, gridirons, and other structures on the tidelands for the purpose of conducting his lumber business. Later the defendants, under permit from the federal government, began removing gravel from the tidelands. In enjoining the gravel removal because it increased the cost of erecting pile structures required for enjoyment of plaintiff's riparian rights, the court stated:

> It is well established that a right of access . . . may be exercised by constructing a wharf, pier or dock over the intervening tide lands to the navigable waters . . . as well as the erection of such other structures as may be necessary to a complete user thereof, such as a dock or revetment in shallower water for the accommodation of barges engaged in the transportation of plaintiff's lumber and other products.

Id. at 701-702.[91] In *State v. Slotness*, 185 N. W. 2d 530, 532 (Minn. 1971), the court held:

> The riparian owner may, to facilitate access to the water, build and maintain wharves, piers, landings, and docks on and in front of his land and extend the same into the water, even beyond low-water mark, to the point of navigability.

(There the State owned the bed of the stream below low water mark.)

Riparian structures should not be disturbed unless they extend into a lake beyond "the point of practical navigability", which is "largely, if not entirely, a question of fact". *Illinois v. Ill. Central R. Co., supra*, 184 U. S. at 99.[92]

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[91]Additionally, the court did not limit the right to personal use but stated that it included the building of structures "to expand and carry on . . . business" as reasonably necessary under the circumstances. *Id.* at 702.

[92]The court concluded that piers, docks and wharves erected in Lake Michigan by a railroad company by virtue of its riparian ownership could not be said to extend beyond the point of practical navigability, having reference to the manner in which commerce is conducted on that lake, where the structure extended no farther than necessary to accommodate a great number of vessels of moderate capacity, and the average depth of water at the outer line of the structures was insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake. This case was before the Court before. *Ill. Central R. Co. v. Illinois, supra.* 146 U. S. 387.

Whether riparian structures are permissible depends to some extent on the width and other characteristics of the lake or stream. *Stevens Point Boom Co. v. Reilly*, 49 N. W. 978, 979 (Wis. 1879), involved the question of whether logging booms placed in the Wisconsin River exceeded the limits of riparian rights. Relying in part on *Atlee v. Northwestern Union Packet Co., supra,* the court held that the scope of the right of access is a relative matter, saying in part:

> It is impossible to give a general rule limiting its extent. That will always depend upon the conditions under which the right is exercised; the extent and uses of the navigable water; the nature and object of the structure itself. A structure in aid of navigation which would be a reasonable intrusion into the waters of Lake Michigan would probably be an obstruction of navigation in any navigable river within the state. A logging boom which would be a reasonable intrusion into the waters of the Mississippi would probably be an obstruction to navigation in most or all of the logging streams within the state. The width of a river may justify a liberal exercise of the right of intrusion, or may exclude it altogether. Its extent is purely a relative question.

These authorities indicate that the Tribes view the legitimate purposes of a riparian structure too narrowly. Their contention that *United States v. 62.61 Acres of Land, supra,* controls this issue is not compelling. That was a condemnation suit involving compensation for a stone jetty. In opening up Little Creek on Chesapeake Bay, a railroad, pursuant to a permit, had constructed two large stone jetties into the Bay to accommodate deep draft vessels and to protect the Little Creek channel from ravages of storms and waves. The defendants had acquired

property on the west side of Little Creek to which the western jetty abutted. The court held they did not own the jetty and were not entitled to compensation for it. The court concluded that the jetty "was incorporated into the real estate of the water's floor rather than being a mere appurtenance to the shore as a wharf or pier"[93] and found the "most significant difference" was the purpose: "While a wharf is generally used for loading and unloading water vessels, this jetty's primary function is to protect a channel entrance". 547 F. 2d at 820-21. The landowner did not use the structure to gain access to the navigable portion of the water body; nor did it protect or enhance any right of access associated with his property. In this case the Namens maintain the structure does facilitate and protect access.

If the structure facilitates and protects access and collaterally protects other property rights,[94] it is not nec-

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[93]The court noted that "constructing a stone jetty for the purpose of protecting an entrance to a dredged channel cannot come within the right of a riparian owner to 'wharf out' recognized at common law and also by statute." 547 F. 2d at 820, n. 4. The court also noted that, "Generally speaking, a wharf is similar to a pier, if not synonymous", quoting from the description of wharfs and piers contained in *Atlee v. Packet Co., supra*, which is quoted at note 89, *supra*. *Id.* at n. 2.

[94]The Namens claim that a recognized common law purpose of a structure is to protect the landowner's shoreline, citing *Crawford v. West India Carrier*, 337 F. Supp. 262 (D. Fla. 1971), reversed on other grounds, 492 F. 2d 679 (5 Cir.) *cert. denied*, 419 U. S. 836 (1974). I am not convinced, however, that this case can be read as broadly as Namens contend. The landowner had secured a permit from the Corps of Engineers to construct "four groins from the upland into the foreshore of the ocean for a distance of 200 feet". The court concluded as a matter of law that "a littoral or upland owner has the right to construct groins into the ocean, provided a permit therefor is first obtained from the Corps of Engineers." *Id.* at 276.

essarily disallowed under federal common law. Of course the structure cannot interfere unreasonably with navigation rights or Indian Treaty rights.

In sum, the cases support the conclusion that riparian structures should not be disturbed if (1) they facilitate and protect access to navigable waters and collaterally protect other property, (2) do not extend into the Lake beyond the "point of practical navigability", and (3) are reasonably necessary under the circumstances "to expand and carry on business", (*Illinois v. Ill. Central R. Co., supra*); (4) subject to the right to control their erection and use to the extent necessary "to prevent their being made obstructions to navigation and standing menaces of danger" (*Atlee v. Northwestern Union Packet Co., supra*); (5) the use of the structures by others may be considered (*Shively v. Bowlby, supra*); and (6) the scope of access is a relative matter depending in part upon the size of the lake (*Stevens Point Boom Co. v. Reilly, supra*).

(B) Burden of Proof Under 25 U. S. C. § 194

In the memorandum decision entered September 20, 1979 the court denied the Tribes' motion for summary judgment on Counts I, II, III, V, VI, VII, and VIII of their second amended complaint. In these counts the Tribes allege, *inter alia*, that the Namen structures are more extensive than permissible under federal common law, that they interfere with navigation on the Lake and with the Tribes' fishing and boating rights, and that their use degrades the water quality of the Lake. The court also concluded that a summary judgment proceeding does not come within the provision of 25 U. S. C. § 194, and that the Tribes had the burden of proof on their motion for

summary judgment. All parties were given an opportunity to present additional evidence and to file supplemental briefs with respect to the burden of proof under § 194 at trial.

No further evidence was presented by either the Tribes or the United States. Both argue in their supplemental briefs (1) that the court was in error in holding that § 194 was not applicable on motions for summary judgment, and (2) that § 194 applies to cases involving the extent, nature and regulation of riparian structures.

(1) Burden of Proof on Motion for Summary Judgment

25 U. S. C. § 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". The moving party "carries the burden of proof; he must show that no genuine issue of material fact exists and this is true even though at the trial his opponent would have the burden of proving the facts alleged". *Doff v. Brunswick Corporation*, 372 F. 2d 801, 805 (9 Cir. 1967). The material "lodged must be

viewed in the light most favorable to the opposing party". *Adickes v. Kress & Co.*, 398 U. S. 144, 157 (1970). The trial court must "resolve all reasonable doubts touching the existence of a genuine issue as to a material fact against the moving party". *Hector v. Wiens*, 533 F. 2d 429, 432 (9 Cir. 1976).[95]

The plain language of § 194 "In all trials" would not bring a summary judgment proceeding within the purview of the statute. It is, of course, true, as the Tribes and Government state, that when § 194 was enacted,[96] summary judgment procedures were not in existence. I cannot agree, however, that this affords a basis for concluding that a prior statute would implicitly constitute an exception to the well settled rules applicable to summary judgment proceedings. The moving party has the burden of proof regardless of which party has the burden at trial.

The Tribes argue that they met their burden by showing "a presumption of title to the lakebed",[97] and that the burden then shifted to the Namens and City of Polson "to show by affidavits that a factual dispute exists as to whether their riparian structures, located on the lakebed, are within the limits permissible under common law

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[95]See also *United States v. Dibble*, 429 F. 2d 598, 601 (9 Cir. 1970); *California Pacific Bank v. Small Business Admin.*, 557 F. 2d 218, 220 (9 Cir. 1977); 6 Moore, Federal Practice ¶ 56.15 [1. -00] at 56-405 (2d Ed. 1976).

[96]As the Court stated in *Wilson v. Oneida Indian Tribe*, *supra*, "§ 194 is a 145 year old, but seldom used, statute."

[97]On the issue of title to the beds and banks of the Lake below high water mark, there was no genuine issue of any material fact and the Tribes were entitled to prevail as a matter of law. Summary judgment in favor of the Tribes was granted.

rights". It is clear, as this court has found, that Namens and Polson have shown that a factual dispute exists on this issue. The Tribes are not entitled to summary judgment in the absence of a showing that there is no genuine issue of material facts and that they are entitled to judgment as a matter of law.

(2) Burden of Proof at Trial

I turn now to the more troublesome problem of determining which party has the burden of proof at trial. While the Tribes apparently still rely primarily on their motions for summary judgment, the court has made it clear that the case has been submitted for a final disposition on the merits.

§ 194 was construed by the Supreme Court in *Wilson v. Omaha Indian Tribes, supra.* At issue in *Wilson* was "the ownership of a tract of land on the east bank of the Missouri River in Iowa". The Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands, claimed the tract "as part of reservation lands created for it under an 1854 treaty". Iowa and several individuals contended that "past movements of the Missouri River washed away part of the Reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners". The case clearly involved a dispute with respect to title to the land in question. The Court held that § 194 applied to the private petitioners, but not to the State of Iowa.

The Court in *Wilson* noted that a major purpose of § 194 was "to protect the rights of Indians to their properties", 99 S. Ct. 2529, 2536, that Congress intended its

provisions "to protect Indians from claims made by non-Indian squatters on their lands", *Id.* at 2537, and that § 194 "is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular area under dispute". *Id.* at 2538. It "contemplates the non-Indian shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession". *Id.* at 2539.[98] In *Wilson* all parties were claiming title to a particular area of land. Insofar as the claims based on allegations of violation of riparian rights are concerned, this case does not involve any dispute as to ownership. This court held in *Namen I* and reaffirms here, that (1) the United States holds the beds and banks of the South Half of Flathead Lake below high water mark in trust for the tribes; and (2) the fee patents issued to Namens' predecessor, City of Polson, and others under the Flathead Allotment Act and Villa Sites Act include the customary riparian rights of access and portage.

The remaining controversy is concerned with whether structures erected by the Namens and Polson constitute an abuse of their riparian rights. This issue does not involve any question of title or previous possession or ownership. Strictly construed, I question whether § 194 should be extended to include claims relating to riparian use.

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[98]The Court noted also that it was "not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees' incide of ownership to determination by the applicable state law. The issue here is whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established." *Id.* at 2539-40.

In a sense, however, rights of property are involved. Recognizing that the statute must be liberally construed with doubtful expression being resolved in favor of the Indians, I conclude that the statute is applicable with respect to the Namens. In other words, the Namens have the burden of showing by a preponderance of the evidence that the riparian structures are permissible even though they extend beyond the high water mark; that the structures do not interfere unreasonably with navigation or with the Tribes' fishing and boating rights; and that the structures have not degraded the water quality of the South Half of Flathead Lake. This does not mean, however, that the Tribes are relieved from presenting evidence in support of their allegations on these issues.

(C) Nature, Purpose and Use of Namen Structures

On the basis of extensive discovery, the court set forth in *Namen I* numerous undisputed facts, including a brief description of the Namen structures. 380 F. Supp. at 456-457. The court concluded that the question of whether any of the structures constitute an abuse of riparian rights could not be "resolved on the basis of undisputed facts" and that as to this issue a further hearing would be required. The court anticipated oral evidence at a trial. The parties, however, have chosen to rely on the discovery prior to *Namen I* and supplemental discovery, including affidavits. With the exception of the supplemental affidavit of James M. Namen, filed August 22, 1979, and the affidavit of Robert E. Schumacher, district fisheries manager for the State of Montana, filed August 27, 1979, all of the material submitted by all of the parties was considered in ruling on the Tribes' motion

for summary judgment. The Namen supplemental affidavit and Schumacher affidavit are also now properly before the court.

(1) Nature of Structures

Part IV, Tribe's Right to Regulate Riparian Development, under (B), pages 40-41, and (G), page 59, contains a description of Flathead Lake and a general description of the nature of the structures constructed by Namens and their predecessors and by the City of Polson.

Supplementing the facts set forth in Part IV and incorporating the facts set forth in *Namen I*, the court finds that the following facts are undisputed:

(1) The Namens operate a business known as Jim's Marina from land riparian to Flathead Lake, at Polson, Montana. They sell and repair boats and boat accessories. In furtherance of their business, structures have been constructed which extend beyond the high water mark and encroach on the bed and banks of Flathead Lake. A plat of the Namen property is attached as Appendix A.

(2) In the late 1940's, Namen's predecessors built an L-shaped wooden dock and a metal shed beyond the high water mark. These structures are supported by wooden pilings and thus the contours of the bed and bank were not altered during the construction. The dock extends perpendicularly from the shoreline in a northerly direction for approximately 270 feet and runs parallel to the shoreline in a westerly direction another 45 feet. It is between eight and ten feet wide and is used for temporary docking purposes and while the boats are being

repaired. A power driven hoist for lifting boats and gasoline pumps for refueling them are mounted on the dock. The metal storage shed is constructed on the easterly side of the dock. Approximately one-half of its foundation is on fast land, and the other half extends 40 to 80 feet over the lakebed. The building is approximately 60 feet wide and is used to store boats.

(3) A breakwater and docking facility was constructed by Namens in 1973. Located approximately 160 feet to the west of the wooden dock, it is also L-shaped and extends approximately 340 feet onto Flathead Lake from the highwater mark and then runs parallel to the shoreline in an easterly direction for approximately another 200 feet. It is of rock fill construction, trapezoidal in shape, with a base approximately 40 feet wide, a top 10-15 feet wide, and an average height of ten feet measured from the lake bed. 35 floating wooden docks, which the Namens rent to various boat owners, are connected to the protected, eastern side of the breakwater. The portion of the breakwater running parallel to the shoreline also protects and encloses the Namens' wooden dock and shed.

(4) The water level of Flathead Lake fluctuates approximately ten feet due to regulation of the water flow at Kerr Dam on the outlet of the lake. It reaches the high water mark for approximately ten weeks during the summer months. During the winter, when the level drops to the low water mark, the Lake in front of Namens' property becomes navigable for small recreational crafts approximately 450 feet out from the high water mark. None of the Namens' structures extend to this point.

(5) During the ten weeks when the lake reaches the high water mark, the structures are obviously more extensive than necessary to reach navigability. Most crafts which use the lake are 16 to 20 feet in length and draw about four feet of water. At high water approximately 75 percent of the length of Namen's breakwater and 60 per cent of the length of the wooden dock extend beyond the contour where the water reaches this depth. The 200 foot long fill at the end of the breakwater which runs parallel to the shoreline is in approximately ten feet of water during high water periods. During this period the relative positions of the dock and breakwater provide Namens with a lagoon, enclosing approximately 64,000 square feet of the lake bed and water. A person navigating along the shore line in a small craft would have to divert his course approximately 300 to 350 feet toward the center of the Lake to navigate around the obstruction.

(6) On the other hand, when the Lake is at low water, the Namen structures create no obstruction to navigation since they are above the low water mark. During the period when the level of the Lake is between the low and high water mark, Namens need the additional length in the wharves to reach the point of navigability. Since the Lake is several miles wide, a person detouring around the obstruction caused by the Namen structures at all times has adequate additional water through which to navigate.

(2) Use and Purpose of Structures

The record contains three affidavits of James M. Namen with respect to the use and purpose of these struc-

tures. His position is summarized in his supplemental affidavit filed on August 22, 1979, in which he stated:

> As I stated before, all of the facilities which are portrayed in the exhibits attached to my previous affidavits and in the photographs are used in conjunction with my business which is to sell, maintain, service, and store boats which are used to navigate the waters of Flathead Lake.
>
> The tin shed, to which reference has been made in Indian briefs and which is described in various exhibits proffered on behalf of the Tribes and Namen, extends out over the high-water mark. This shed is used for the storage of boats and is an integral part of my business. This shed is similar to facilities used by other marinas, including Stancraft located at the northern end of the lake. In regard to Stancraft, however, ultimately, they filled under the shed and built a breakwater in front of it for its protection. Throughout the south and north half of the lake, there are located boathouses, sheds, and storage facilities similar to the tin shed. Some are used for private, and others for commercial purposes; however, the basic function is the same.
>
> The tin shed is a part of a large pile-supported dock which extends out at right angles from the shoreline. On this dock is mounted a power-driven hoist which lifts boats in and out of the lake. The dock also supports gasoline pumps which supply gas to boat owners who utilize the waters of Flathead Lake.
>
> The long dock facility adjacent to and a part of the shed is utilized by many boats for temporary parking purposes and while the boats are being repaired by me or members of my staff.
>
> Adjacent to the west side of the pile-driven dock is a concrete boat ramp. This boat ramp is necessary for putting boats in and taking boats out of the water.

West of the concrete ramp is the breakwater. Inside the breakwater and attached to it are dock facilities for 35 boats. Each of these dock spaces is rented to some third party. The third party docks a boat in the dock space and uses the boat to navigate the waters of Flathead Lake.

The breakwater is an integral part of the dock facility and is not unlike that utilized by the State at Finley Point State Park, the Indian-owned facility at Blue Bay, and numerous other private and commercial installations in both the north and south halves of the lake.

The size of the breakwater and the size of each and every one of the structures which are located on my land and extend into the south half of Flathead Lake are absolutely necessary for the maintenance of my business. Each and every one of the structures is required to facilitate access to and navigation of the lake. Obviously, when one concentrates 35 boats in one area and a sudden storm arises, it is absolutely impossible to take all of the boats out of the water and still prevent damage to them. Thus, there must be a haven in which the boats are protected. In the case of my business, the protective haven is the breakwater to which the dock is attached.

Schumacher's affidavit reads in part:[99]

I have been familiar with Jim's Marina since the year 1966. Basically, the structures of which Jim's Marina is constructed have remained the same since that time, except for the installation of a breakwater-dock which was constructed in about 1973. The break-

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[99]Schumacher has had extensive training and experience in fish and wildlife management. He has been enrolled in a number of the workshops, including stream mechanics and hydraulics and hydrology. He has assisted both Lake and Flathead Counties in the administration of the Montana Lakeshore Protection Act and in making recommendations as to the type of structures which should be permitted on Flathead Lake, both on the North Half and on the South Half, under that Act.

water-dock extends at a right angle from the shoreline in a generally northerly direction and then has an arm extension to the east, providing protection for boats and other dock facilities which are partially enclosed by the breakwater.

The breakwater is combined with an area of dock space directly behind it, which accommodates approximately 35 boat stalls. The potential, however, is for much greater boat accommodation within that area.

From the standpoint of planning and attempting to minimize the impact upon water quality, fishery, and the general population's right to enjoy a lake, it is more advantageous to concentrate dock facilities in one particular area, rather than have the number of docks required to service the same number of boats proliferate around the lake. Of course, Jim's Marina does subserve this basic goal of centralization.

Obviously, when one concentrates a number of boats in one particular area, the size of the in-water structure and facility required to accommodate that number of boats is more extensive than the single landowner dock or breakwater facility. However, vis-a-vis the purpose of assisting many persons in gaining access and thus the right to navigate the lake, the size of the facility is no more extensive than is absolutely necessary to accommodate the number of boats which a particular facility is designed to accommodate.

In the case of Jim's Marina, it is designed to accommodate as many boats as are presently stored there, and the facility is necessary to that end. Moreover, it is large enough to accommodate further expansion of docking facilities within the enclosure, thus further supporting the basic goal of centralization and less proliferation of docks. While the size of the structure is extensive, it does not restrict navigation of the lake. When the lake is drawn down, its most northern area is just about at low water.

(3) Effect of Structures on Navigation

As set forth above, Namen stated in his supplemental affidavit that, "Each and every one of the structures is required to facilititate access to and navigation of the lake." Schumacher concluded that, "While the size of the structure is extensive, it does not restrict navigation of the lake."

(4) Effect of Structures on Fishing Rights

While the Tribes presented no direct evidence in support of their allegation that the Namen structures interfere with their fishing rights, they argue that "common sense tell you" that the breakwater, occupying a portion of the Lake, physically reduces the tribal fishing rights.

Namen testified in his supplemental affidavit that he does not prevent tribal members from fishing in the waters of the Lake enclosed by the breakwater; nor does he prevent anyone from fishing off his various facilities. Schumacher stated in his affidavit that the Namen structures "do not significantly affect the fishing"; that if the structures were not there, "no significant fishery would be created in that particular area", and that the "amount of space occupied by the building and structures and affected by them vis-a-vis the tremendous size of Flathead Lake is at most miniscule." Schumacher also stated that "there is some plant growth inside the protected area of the breakwater. Thus, a number of fish upon which game fish feed probably do reproduce in that area, such as Peamouth and Suckers."

(5) Effect of Structures on Water Quality

With respect to the water quality within the breakwater, Schumacher stated that "it is doubtful whether the

ambient level of water quality there is significantly different than the ambient quality of the lake generally." He continued:

> There is a small stream of clear, pure water which flows into the marine-enclosed water, which is overflow from the city reservoirs. This water is potable and comes from the city water supply. Additionally, the inlet into the enclosed area is sufficiently large to permit lake water to circulate within it. The rock and dirt material of which the breakwater is constructed should have stabilized by now, and any sediment that is washed away from that facility would probably be insignificant at this time. The large rocks further expand the surfaces which can trap oils and exhaust substances. The trapping is by adherence to the rocks, and this permits the substances ultimately to dissipate or volatilize until they are less active.

(D) City of Polson Structures

Supplementing the facts set forth in Part IV and in *Namen I*, the court finds:

(1) The City of Polson owns and maintains, *inter alia*, the following structures:

(a) On the so-called Golf Course property: a dock eight feet wide, 241 feet long, with crib piling, rock filled; a diving platform, 10 feet by 12 feet, and 13 wooden pilings supporting a wire cable to protect swimmers from boating traffic.

(b) At the so-called Municipal Park: a boating dock four feet wide running northerly 228 feet and extending westerly at the lakeside end 156 feet, constructed of cribbed rock fill with concrete decking; with 14 boat slips partitioned by piling and timber with planked platforms; and with a concrete boat ramp 25 feet by 45 feet.

(c) At the so-called Riverside Park: a boating dock six feet by 111 feet, with an L extension running 22 feet; a boating dock five feet by 45 feet; a concrete boating ramp 20 feet by 50 feet; and a concrete brick building 16 feet by 24 feet, housing a sewage lift station and toilet facilities, located 230 feet from the boating ramp.

(2) The structures on the Golf Course were constructed in 1936 and last modified in 1972. The structures on the Municipal Park were constructed in 1972 and replaced structures in operation since 1910. All docks and ramps were last renovated and reconstructed in 1968.

(3) The two large docks extend into Flathead Lake beyond the high water mark.

(4) Prior to laying out the City of Polson in 1910, land included in the city was used as a lake port in commerce involving passengers and goods; and subsequent to the organization of the city and continuing through the early 1920s, prior to the extension of a railroad line to Polson, the city was the termination and embarkation point for substantial movements of commerce.

(5) The docks now maintained by the City of Polson are utilized by recreational users and by boats operated by persons traveling to and from the city; in boat excursions (both commercial and private), to areas both in the South Half and the North Half of the Lake; and by barges engaged in pile driving operations in construction of docks and breakwaters located on both the South Half and the North Half of the Lake.

(6) Schumach[illegible] stated in his affidavit that he is familiar with the dock facilities constructed by the City

of Polson and last inspected them on August 13, 1979. He concluded:

> While the structures of the City of Polson are not quite as extensive as those constructed at Jim's Marina; nevertheless, they serve the same purpose and again subserve the basic goal of concentrating boat traffic and storage in a particular area. My remarks with regard to fish reproduction, water quality, and navigation in reference to Jim's Marina would also be applicable to the structure maintained by the City of Polson.[100]

(E) Structures of State of Montana

The State of Montana, Department of State Lands owns a number of parcels of land which are riparian to the South Half of Flathead Lake, with structures extending below the high water mark.

The Montana Department of Fish and Game, on behalf of the State of Montana, owns, operates and regulates a number of state parks and recreational areas which are riparian to Flathead Lake, some of which are on the south half of the Lake. The public uses these areas for

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[100]There is a question also as to whether § 194 applies to the City of Polson. In *Wilson, supra*, the Court held that it applied to two corporate defendants, as well as individuals, noting that "The word 'person' for purposes of statutory construction unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies and joint ventures.' 1. U. S. C. § 1." The Court concluded, however, that § 194 does not apply to the "sovereign States of the Union". 99 S. Ct. at 2537-38. It is questionable whether it applies to the City of Polson as a political subdivision of the State of Montana. See *Dietrich v. City of Deer Lodge*, 218 P. 2d 708 (Mont. 1950). In view of my conclusion that Polson has met the burden of proof, it is unnecessary to decide this question.

boating, swimming and other water sports, and for access to fishing and other recreational activities.

The State of Montana owns and maintains the University of Montana Biological Station, consisting of various tracts of land on Yellow Bay, Bull Island, Polson Bay and Bird Island, within the South Half of Flathead Lake. The State acquired the Yellow Bay property and Bull Island in 1905, Bird Island in 1917, and the Polson Bay property in 1946. The Biological Station maintains a number of structures which extend into the water below high water mark, including a lift station, sewage treatment plants and docks.

(F) Conclusions re: Alleged Violation of Riparian Rights

I confess to a sense of frustration in determining whether the riparian structures in question were permissable and whether the Tribes have suffered any harm or damage as a result of the structures in the absence of any "live testimony" or affidavits on behalf of the Tribes. After the Tribes' motions for summary judgment were denied they were twice given an opportunity to present additional evidence. In addition to affidavits considered by the court in denying the Tribes' motion for summary judgment, Namens, et al have relied on the supplemental affidavit of James M. Namen and the Schumacher affidavit with respect to the use and purpose of the structures and their effect upon rights claimed by the Tribe. The affidavits are persuasive in the absence of any evidence refuting them.[101]

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[101]No evidence was offered by the Tribes in response to these affidavits; nor did counsel comment on the affidavits in

(Continued on following page)

The Tribes are seeking injunctive and declaratory relief of a drastic nature against both Namens and the City of Polson, including the immediate removal of all structures and landfills which extend beyond the high water mark of the Lake, or, in the alternative, all structures which are more extensive than permissible under federal common law. With the exception of the breakwater, all of the Namen structures had been in place at least 25 years when the Tribes' action was filed in 1973. Some of the structures owned by the City of Polson had been in place at least 37 years, and others replaced structures in place in 1910. Other riparian structures as well had been in place for over 50 years, all with the full knowledge of the United States and the Tribes, and without objection from either prior to this suit.[102] The court recognizes, as it did in *Namen I*, that there is no statute of limitations and that the doctrine of laches is not applicable. On the other hand, the erection of the numerous structures extending beyond high water mark over such a long period of time without objection is a factor to be considered in determining whether the structures are per-

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(Continued from previous page)

their supplemental memoranda. Rather these memoranda were devoted to the issues of burden of proof under § 194 and the effect of the Federal Water Pollution Control Act and Regulations. While the Tribes submitted a letter from counsel for the Corps of Engineers stating that the Corps was "enforcing its section 404 jurisdiction" on Flathead Lake, there was no evidence regarding any action taken by the Corps with respect to the Namens' structures; nor, as set forth above, was there any evidence to refute Namen's statement that he had been advised by the Corps of Engineers that no permit was required.

[102]See note 79, page 59, supra, and *Namen I*, 380 F. Supp. at 466.

missible and whether the Tribes have suffered harm or damage.[103]

Namen states in his affidavit that all of the structures are "absolutely necessary" for the maintenance of his business and are required "to facilitate access to and navigation of the lake". It is true, as the Court noted in *Atlee v. Packet Co., supra,* that the mere fact that a riparian owner may make a structure useful to his "personal pursuits or business" does not justify its construction into naavigable waters, without license or special authority, where there is no "claim or pretense" that it "is in aid of navigation". In *Atlee* the structure in question was used solely by the riparian owner in connection with his lumber business. Here Namens operate a marina, and their structures and facilities are used by their customers and by the public in aid of navigation. Likewise, the structures of the City of Polson facilitate access to and navigation of the Lake by many persons operating boats on the Lake.

Applying the legal criteria set forth above, and considering all of the pretrial discovery, documents, photographs, and affidavits, I have little difficulty in concluding

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[103]In the recent case of *Ohio v. Kentucky,* 100 S. Ct. 588, 594 (1980), Mr. Justice Powell noted in his dissenting opinion that, "Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claimed by another party", citing *Michigan v. Wisconsin,* 270 U. S. 295, 308 (1926). In that case, a boundary dispute between the states of Michigan and Wisconsin, the Court held: "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well."

that the defendants in the action instituted by the Tribes have shown by a preponderance of the evidence that all of the structures in question with the possible exception of the breakwater, are permissible, do not unreasonably interfere with tribal navigation, fishing or hunting, and do not result in degrading the waters of Flathead Lake.

The breakwater constructed in 1973 presents a closer question. It appears from the Nansen affidavits, however, that the breakwater is an integral part of the dock facilities and in effect a continuation of the Nansens' wharf; that the breakwater and other structures are used for mooring the Nansens' boats and boats of their customers; and that the breakwater and other structures are necessary for the maintenance of the Nansen business and are "required to facilitate access to and navigation of the lake". Schumacher states that while the size of the Nansen structures, with the breakwater, is extensive, they do not restrict navigation and are large enough to accommodate further expansion of the docking facilities and thus support "the basic goal of centralization and less proliferation of docks". In the absence of evidence refuting the Nansen and Schumacher affidavits, evidence that the Corps of Engineers has found any of the structures impermissible, or evidence of damage and harm suffered by the Tribes, I conclude the breakwater also is a permissible structure.[10]

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[10]While contending that the riparian structures must be removed unless permitted by the Tribes, the Tribes suggest the possibility that under section 5 of the Tribal Ordinance 64A (revised), the breakwater, as well as the other structures maintained by Nansens and the City of Polson, could be permitted by the Board.

VII. Prospective Regulation of Riparian Rights

This is another very difficult and complex case involving a conflict between Indians and non-Indians on an Indian reservation which is likely to continue in the future. The tribes are properly concerned with the regulation of future development of riparian structures, as well as those now in place. While not necessary to a decision in this case, I have concluded that the following comments are appropriate with respect to future regulation of riparian structures on the South Half of Flathead Lake.

All parties agree that a "unique" situation is presented. All agree that a resolution of the continuing dispute on a case by case basis is undesirable, particularly in view of the large number of non-Indian riparian landowners who have built structures extending beyond the high water mark. The Tribes have proposed what they recognize as a "unique solution", i.e., regulation by a Board of seven members appointed by the Tribal Council, of which not more than four will be members of the Tribe, with a right of review by the Tribal Council and further review in the Tribal Court. Namens, Polson, and Montana propose regulation by the State of Montana.

For the reasons stated in Part IV, this court has concluded that the Tribes do not have the authority to regulate the rights of non-Indian riparian landowners, in the absence of "affirmative delegation of such power by Congress". As the court noted in *United States v. Montana, supra,* the Tribe "is neither the United States nor its Council the Congress thereof". 604 F.2d at 1172. The

Tribes' proposal is not acceptable to the non-Indian land owners.[105]

Namens, et al argue that *Wilson v. Omaha Indian Tribes, supra,* supports their position that state law should be applied and that the State of Montana accordingly has authority to regulate riparian rights on the South Half as well as the North Half of Flathead Lake. As noted above, *Wilson* involved the ownership of a tract of land which had been affected by movements of the Missouri River on the interstate boundary between Nebraska and Iowa. The Court held that federal law governed the substantive aspects of the dispute, but concluded that state law should be "adopted" in determining whether the changes in the river had been avulsive or accretive. The Court saw "little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal law." The Court noted that the United States feared "a hostile and unfavorable treatment at the hands of state law", but concluded that adequate means were available to insure fair treatment of tribal and federal interests, since the "legal issues are federal and the federal courts will have jurisdiction to hear them." 99 S. Ct. at 2541.

It would, of course, be desirable to have the same regulatory body exercise authority on both the North

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[105]Namens argue that the Tribes Shoreline Protective Ordinance "clearly constitutes an unjustified exercise of jurisdiction over non-members who have no meaningful voice in the legislative process which spawned it". Moreover, there is a marked difference between the capability for proper regulation by the United States through the Secretary of the Army and Corps of Engineers, or the State of Montana, through its regulatory agencies, and a Board of the type proposed by the Tribes.

Half and South Half of the Lake.[106] Congress could properly delegate this authority to the State of Montana, but I do not believe this court has jurisdiction to require the adoption of state law for this purpose.

As suggested above, a viable alternative to regulation by the Tribes or the State of Montana is the assumption by the Secretary of the Army, through the Corps of Engineers, of his authority to regulate riparian rights of non-Indians on the South Half of Flathead Lake under the Rivers and Harbors Act, as well as under the Clean Water Act (formerly the FWPCA). In exercising this authority, cooperation with the State of Montana in the exercise of similar authority on the North Half of the Lake would be desirable. It may be, however, that action by Congress will be required to determine the regulatory authority and make the necessary delegation in order to reduce the likelihood of continued litigation of the type involved in this action.

VIII. Conclusion

The court adheres to all conclusions in *Namen I*, summarized at pages 8 and 9, and in addition concludes that (1) there has been no disestablishment or diminishment of the Flathead Indian Reservation, and (2) the Tribes do not have authority to regulate the riparian rights of the Namens, State of Montana, and City of Polson. The motions of the Tribes and the United States for summary

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[106]Namens contend that Montana's Water Use Act, enacted in 1973, and Lakeshore Protection Act enacted in 1975, described in Part IV at page 39, will adequately protect the respective rights of the Tribes and non-Indian riparian landowners on Flathead Lake.

judgment with respect to the ownership of the beds and banks of the South Half of Flathead Lake and the disestablishment and diminishment of the Flathead Indian Reservation are granted. Their motions with respect to the right to regulate riparian rights of non-Indians on the South Half of Flathead Lake are denied.

The Tribes' motion to dismiss Count IV of their second amended complaint without prejudice is granted.

The Tribes' motion for summary judgment on Counts I, II, III, V, VI, VII and VIII of their second amended complaint is denied.

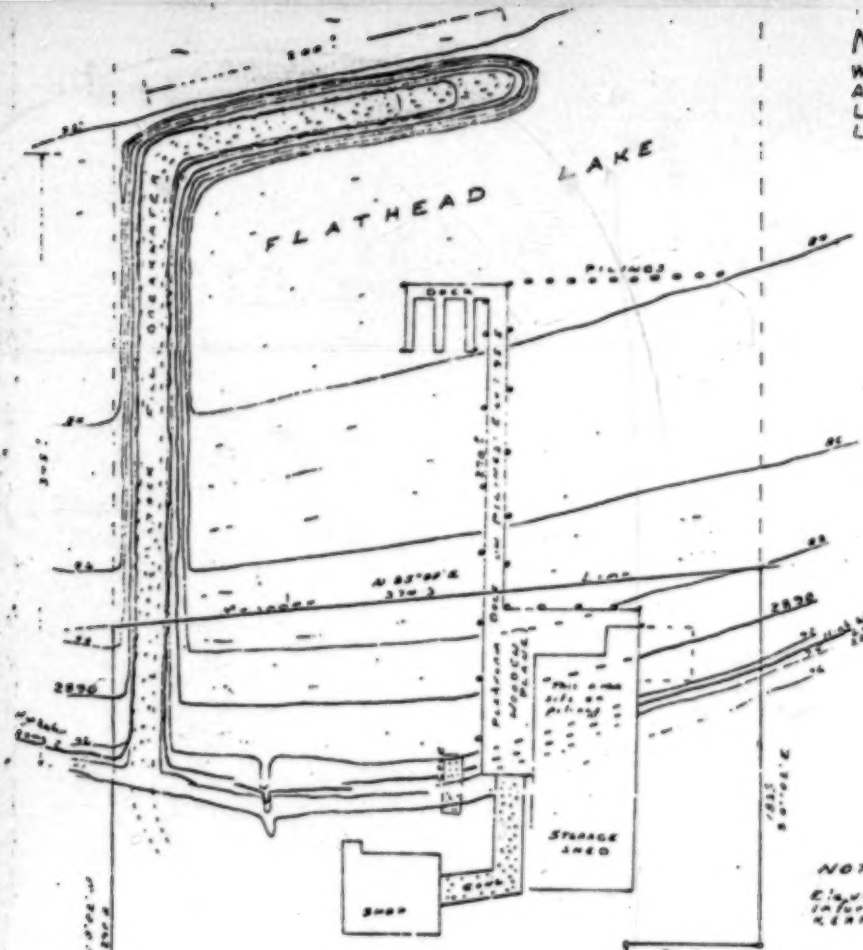
The motions of Namens, City of Polson, and State of Montana to dismiss Counts II, III, V, VI and VII of the Tribes second amended complaint and Counts II, III, IV and V of the United States' complaint in intervention are granted, subject, however, to any right of the Secretary of the Army, through the Corps of Engineers, to regulate riparian rights of non-Indians on the South Half of Flathead Lake, under the Rivers and Harbors Act of 1899 33 U. S. C. § 401 *et seq.*, and the Clean Water Act of 1977, amending the Federal Water Pollution Control Act of 1972, 33 U. S. C. § 1251 *et seq.*

DONE AND DATED this 7th day of April, 1980.

/s/ W. J. Jameson
United States District Judge

NAMEN PROPERTY

WATERFRONT STRUCTURES
AND ELEVATION CONTOURS
LOT 2, SEC. 3, T. 22 N., R. 20 W.
LAKE COUNTY, MONTANA



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SCALE, 1" = 40'

SURVEYED
JANUARY, 1978

CLIENT
CONFEDERATED SALISH AND KOOTENAI TRIBES
DIXON, MONTANA

NOTE
Elevations based on data information provided by KERR DAM forebay station

TYPICAL CROSS SECTION OF ROCK FILL BREAKWATER

SURVEYOR'S CERTIFICATION

I hereby certify that
HARRY P. MEDLAND, MONT. R.L.S. No. 4554
was employed by the Confederated Salish and Kootenai Tribes
to perform the survey shown on this plat.

HARRY P. MEDLAND
Box 458
Dixon, Montana

APPENDIX C

Montana Power Co. v. Rochester.
No. 9917.

Circuit Court of Appeals, Ninth Circuit
April 15, 1942.

1. Indians

An Indian treaty creating Flathead Reservation including land adjacent to one side of lake should be construed to include half of lake. Treaty of July 16, 1855, 12 Stat. 975.

2. Navigable waters

Generally, as regards public lands abutting on navigable waters in territories, title to area below high water was held by the United States in trust for the states ultimately to be created, leaving it to the latter to determine what right, if any litoral proprietors have to soil below high-water mark. 43 U. S. C. A. § 931.

3. Indians

The United States could deal with public land below high-water mark of lake as it saw fit, and question whether Indian patentees of land in Flathead Reservation, created by Indian treaty, took to high or low-water mark was not one of state law. Treaty of July 16, 1855, 12 Stat. 975; Act Feb. 22, 1899, 25 Stat. 677, § 4; 25 U. S. C. A. §§ 348, 349.

4. Indians

Under Indian treaty creating Flathead Reservation which included half of lake, the United States intended to

hold the entire reservation, submerged lands no less than uplands, in trust for Indians rather than for the future state of Montana. Treaty of July 16, 1855, 12 Stat. 975; Act Feb. 22, 1899, 25 Stat. 677, § 4; 25 U. S. C. A. §§ 348, 349.

5. Indians

The provision of the General Allotment Act that when land had been conveyed to Indians by patent, each allotee should have benefit of and be subject to laws of state or territory in which he resided was intended to define status of individual Indians in their relation to the state and was not intended to enlarge quantum of allotments theretofore surveyed and held in trust. 25 U. S. C. A. §§ 348, 349.

6. Public lands

Generally patents of the United States to lands bordering navigable waters convey only to high-water mark.

7. Indians

Under Indian treaty creating Flathead Reservation and safeguarding right of Indians to take fish in waters within or bordering reservation, patent to Indian allotee of land bordering lake conveyed title to high-water mark only, and title to land below such mark was in the United States in trust for the confederated Flathead tribes. Treaty of July 16, 1855, 12 Stat. 975; Act Feb. 22, 1899, 25 Stat. 677, § 4; 25 U. S. C. A. §§ 348, 349; 43 U. S. C. A. § 931.

Appeal from the District Court of the United States for the District of Montana; James H. Baldwin, Judge.

Action by Eugenia H. Rochester against the Montana Power Company for damages for the flooding of an isthmus over which plaintiff claimed a right of passage. From a judgment for plaintiff, defendant appeals.

Reversed.

J. E. Corette, Jr., of Butte, Mont., and Pope & Smith, Murphy, Garlington & Pauly, J. C. Garlington, and Russell E. Smith, all of Missoula, Mont., for appellant.

Lloyd I. Wallace, of Polson, Mont., Mulroney & Mulroney, of Missoula, Mont., and R. F. Gaines, of Butte, Mont., for appellee.

Before GARRECHT, HANEY, and HEALY, Circuit Judges.

HEALY, Circuit Judge.

The basic question here presented is whether a fee patent to allotted land bordering on Flathead Lake (a navigable lake), in the Flathead Indian Reservation, Montana, conveyed title to the low water mark of the lake, or to high water mark only.

Under a license issued by the Federal Power Commission and approved by the Secretary of the Interior, appellant constructed a dam in the outlet of Flathead Lake, the purpose of which was to develop water power and promote irrigation. Since the completion of the dam in 1938 the water of the lake has been maintained above its prior low water level. By the terms of the license the licensee was required to pay into the Treasury "as compensation for the use in connection with this license, of the Flathead Indian tribal lands" certain annual charges aggregating

about three million dollars, plus interest thereon.[1] The project specifically comprehended a reservior in the river and lake.

Appellee owns a parcel of land comprising a little more than three acres, situated in the lake itself and joined to the shore by a narrow bar or isthmus. Her land, which is known as the "Armo Villa Site," had been surveyed and sold to appellee's grantor as surplus unallotted land of the Reservation pursuant to the provisions of the Act of April 23, 1904, 33 Stat. 302; and the patent to the same expressly reserved the right to flood all lands bordering the lake to a level of nine feet above the high water mark of the year 1909, for the purpose of irrigation or the development of water power. The reservation of the flood easement was pursuant to the Act of August 24, 1912, 37 Stat. 526. Since the completion of the dam, the lake level has at no time reached this elevation; in fact, it has not exceeded the ordinary high water mark, the effect of the dam being merely to prevent normal subsidence.

Appellee, at considerable expense, has established a summer home on her land. For the purpose of obtaining access to it she acquired an easement in a certain parcel, referred to as Lot 4, on the shore of the lake adjacent to the bar. The grant included a right of way over the isthmus, the grantors apparently assuming that the isth-

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[1]The Secretary of the Interior, whose consent to the project was expressly required by the Act of March 7, 1928, 45 Stat. 212, was of the view that the ownership of the lake and river beds was in the Indians, and this appears to have been a factor in fixing the compensation payable to the tribes. See Senate Document No. 153, pp. 40-42, 71st Congress, 2d Session.

mus was a part of Lot 4. That lot had been conveyed by fee patent in 1920 to Benjamin Courville, a Flathead Indian; and appellee's alleged easement was acquired in 1932 from the grantees of Courville.[1] The patent to Courville contained no reservation of a right to flood.

By the terms of this easement appellee is given the right to pass over Lot 4 by vehicle in order to reach her home on the Villa Site. The bar connecting the Villa Site to the shore is about 1200 feet long and its lowest point is said to be about 240 feet from the Villa Site. The entire bar is and always has been below ordinary high water mark, but it was formerly feasible for vehicles to pass over it during the season of low water, or for a space of from seven and a half to nine months in each year. Since the erection of the dam, however, the entire bar has remained submerged for substantially the whole of each year so that the sole means of access to the Villa Site has been by boat. In the present suit appellee sought to recover damages caused by the act of appellant in thus continuously submerging the isthmus over which she claims the right of passage. The jury awarded her damages in the amount of $5,000; hence this appeal.

Appellee's theory, which the trial court adopted, is that Courville's patent to Lot 4 conveyed title to the low water mark of the lake; that the dividing line between Lot 4 and the Villa Site was the lowest point on the bar or isthmus (even though such point was above low water mark); and that appellee is entitled to recover the damage

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[1]The grant of the easement was in settlement of a suit brought by appellee in the state court to establish her right of way.

caused by the continuous flooding of the bar and the consequent loss of her easement. Appellant, on the other hand, contends that the Courville patent conveyed to the high water mark only the land below that point and under the bed of the lake being held by the United States in trust for the Indians as a tribe. If appellant is right, neither Courville nor his grantees had title to the bar, hence could grant no easement over it; and appellee has therefore no right which has been invaded.

[1] The Flathead Reservation was created by the treaty of July 16, 1855, negotiated with the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, 12 Stat. 975. By the terms of Article II of the treaty there was reserved for the exclusive use and benefit of the tribes a large tract of land the northern boundary of which bisected Flathead Lake,[3] so that the whole of the southerly half of the lake is within the confines of the Reservation.[4] In the briefs there is considerable discus-

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[3]The area of the reservation was described as follows: "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning."

[4]This is clear from the description of the Reservation. Cf. United States v. Romaine, 9 Cir., 255 F. 253. But even if the description were less clear, we would be obliged to construe the treaty as including the southerly half of the lake. Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; Winters v.

(Continued on following page)

sion whether, prior to the treaty, title to these lands was vested in the United States subject only to the Indian right of occupancy, or whether the treaty merely confirmed in the Indians a title which they already had. Appellee strenuously urges the latter proposition; but we think the question is academic. Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the confederated tribes. Obviously, prior to the treaty, title did not rest in any individual Indian, nor could the individual thereafter obtain title to any of the land except by patent from the United States. It was by such a patent that the Indian Courville got his title.

[2-4] The question here is whether the United States continues to hold the land below the line of ordinary high water in trust for the tribes, or whether by virtue of the fee patents, or by force of state law—or the two combined—Scott v. Lattig, 227 U. S. 229, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A., N. S., 107, the title vested in the allotees. Generally, as regards public lands abutting on navigable waters, in the territories, it has been thought that the title to the area below high water was held by the United States in trust for the states ultimately to be created, leaving it to the latter to determine what rights, if any, littoral pro-

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United States, 207 U. S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; United States v. Shoshone Tribe, 304 U. S. 111, 116, 58 S. Ct. 794, 82 L. Ed. 1213; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138. The cases of Taylor v. United States, 9 Cir., 44 F. 2d 531; United States v. Ashton, C. C., 170 F. 509, and Fish v. Wise, 10 Cir., 52 F. 2d 544, are distinguishable.

prietors have to the soil below high water mark.[5] The states have treated these shorelands in different ways, some of them, as for example, Oregon, Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, undertaking to hold or dispose of them in a proprietary capacity; while others, including Montana, Faucett v. Dewey Lumber Company, 82 Mont. 250, 266 P. 646, have regarded the riparian patentee as taking to low water mark. In the circumstances here we do not believe the question whether the Indian patentees took to low water, or only to high, is one of state law. Clearly, the United States in the exercise of its sovereign power had the right to deal with the lands below high water mark as it saw fit. Shively v. Bowlby, supra, Alaska Pacific Fisheries Company v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138; Donnelly v. United States, 228 U. S. 243, 33 S. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Taylor v. United States, 9 Cir., 44 F. 2d 531, 533; and the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region.

Appellee insists, and it was the view of the trial court, that by force of the provisions of § 6 of the General Allotment Act,[6] Montana law governs; and that the Indian Courville must therefore be held to have title to low water mark in virtue of Faucett v. Dewey Lumber Company,

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[5] 43 U. S. C. A. § 931; Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331; United States v. Pacheco, 2 Wall. 587, 17 L. Ed. 865.

[6] Act of February 8, 1887, 24 Stat. 390, as amended by Act of May 8, 1906, 34 Stat. 182, 25 U. S. C. A. § 349.

supra, and the Montana statute and decisions generally. Section 6 of the Act, so far as pertinent, provides: "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 [§ 5 of the original Act], then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they made reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law,"[1] Appellee's argument appears to be that since, upon the issuance of his patent, the Indian is to have the benefit of state law, the patent must be regarded as conveying title to low water mark.

[5] We think the argument puts too great a strain on the statute. The obvious purpose of the provision is to define the status of the individual Indians in their relation to the state. Having been released from tutelage, the Indians are thereafter to be regarded as members of the community with the privileges and duties incident to citizenship. There is nothing in the language of the statute denoting an intent to enlarge the quantum of the allotments theretofore surveyed and held in trust. After the fee patent is issued the Indian has the same property he had before, the only material difference being that he

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[1] As contained in § 6 of the original Act, this provision read as follows: "Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

now has the legal title, where during the period of the trust allotment he had the beneficial ownership only. See § 5 of the Act, 25 U. S. C. A. § 348. In this connection the Montana Enabling Act, Act of February 22, 1899, 25 Stat. 676, is significant. It provides that "until the title thereto [namely, the title to lands, held by any Indian or Indian tribe] shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Section 4. See United States v. Romaine, 9 Cir., 255 F. 253, 260; United States v. McIntire, 9 Cir., 101 F. 2d 650, 654. So far as we are advised, the beneficial ownership of the Indians in the bed and shores of the lake has not been extinguished by the government.

It is inadmissible to suppose that the United States, having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state, the policy of which was necessarily unknown at the time of the treaty, or, for that matter, at the time of the passage of the General Allotment Act; for by adoption of a proprietary policy the state might substantially interfere with, if not foreclose, use of the shores by the Indians in the conduct of their fishing operations. There is, in short, nothing either in the treaty itself or in its setting, or in subsequent legislation, suggestive of an intent that the ownership of lands in the Reservation below the line of ordinary high water was to be at the disposal of the state.

[6, 7] It remains to inquire whether, independently of these considerations, the fee patents to allotted lands in this Reservation ought to be construed as granting title to low water. The Courville patent is in the usual form,

merely conveying title to "Lot 4 of section 25" and the east half of the northwest quarter of an adjoining section, the whole of which is described as containing 110.46 acres. The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark. The rule has its roots in the principle of the common law that ownership of the shore, comprising the area between high and low water, should be in the sovereign in trust for the general weal. See Martin v. Waddell's Lessee, 16 Pet. 367, 10 L. Ed. 997; Shively v. Bowlby, supra. No special circumstances have been called to our attention from which it might be inferred that a different rule ought to be applied here.[8] Such circumstances as there are point in the contrary direction. The Indian society is communal in character rather than individualistic; and this is particularly true in respect of the hunting and fishing grounds of the Indians. The right of the Flathead tribes to take fish in the water within or bordering on the Reservations is carefully defined and safeguarded in Article III of the treaty.

We conclude, therefore, that the patent to Courville conveyed title to high water mark only, and that title to land below that mark and beneath the lake is in the United States in trust for the confederated tribes. It follows that appellee had no right which has been invaded.

Reversed.

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[8] In United States v. Boynton, 9 Cir., 53 F. 2d 297, 298, involving lands in the Lummi Reservation, it was conceded that the allotee took only to the high water mark, and that "the purpose when the allotments were made was to reserve for the common use of the tribe the land over which the tides flowed."

APPENDIX D

The CONFEDERATED SALISH AND KOOTENAI TRIBES et al.,
Plaintiffs,

v.

James M. Namen et al., and City of Polson, a Montana municipal corporation, Intervener, Defendants.
Civ. No. 2343.

United States District Court,
D. Montana,
Missoula Division.
Aug. 14, 1974.

Confederated Tribes of the Flathead Reservation brought action against persons who owned, as successors in interest to original Indian allottee, land which fronted on lake in the reservation for declaratory judgment that piers, wharves, and breakfronts built below the high-water mark by the landowners were a trespass upon the Indians' land and for an injunction against all further trespass and to require landowners to remove the structures. On opposing motions for summary judgment, the District Court, Jameson, J., held that land owners' property extended only to the high-water mark of the lake; that question of riparian rights was a matter of federal common law, not of state or Indian tribal law; that neither treaties establishing the reservation nor the allotment acts specifically granted riparian rights; but that Congress, through the allotment acts and other acts, had evinced an

intent to include riparian rights in the issuance of patents for the allotted lands.

Partial summary judgment for defendants.

1. Indians

Land within the original boundaries of the Flathead Indian Reservation, including land owned by non-Indians as successors of Indians to whom certain lands were allotted and including the south-half of Flathead Lake, is still part of the Flathead Reservation. Treaty of Hellgate, 12 Stat. 975; Act April 23, 1904, 33 Stat. 302.

2. Indians

Allotment to Indian of certain lands fronting on Flathead Lake on the Flathead Indian Reservation conveyed title only to the high-water mark of Flathead Lake and that high-water mark is the boundary of the property owned by Indian's successors in interest. Act April 23, 1904, 33 Stat. 302.

3. Public Lands

Patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to the high-water mark.

4. Indians

Since the time of the Treaty of Hellgate, the United States has held, and still holds, the bed and banks of Flathead Lake below high water in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Treaty of Hellgate, 12 Stat. 975.

5. Navigable Waters

Navigable rivers, and navigable rivers and waters within the Louisiana Purchase, are public highways. 22 U. S. C. A. § 10; 43 U. S. C. A. § 931.

6. Indians

Doubtful expressions in Indian treaties must be resolved in favor of the Indians.

7. Indians

Language in Treaty of Hellgate which provides that "if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right-of-way with free access from the same to the nearest public highway is secured to them" is for the benefit of members of the affected tribes and the term "them" refers to the members of the tribes. Treaty of Hellgate, 12 Stat. 975.

8. Indians

Term "public highway," as used in Treaty of Hellgate, does not include the south-half of Flathead Lake. Treaty of Hellgate, 12 Stat. 975; 22 U. S. C. A. § 10; 42 U. S. C. A. § 931.

See publication Words and Phrases for other judicial constructions and definitions.

9. Navigable Waters

Public's right of navigation and the riparian owners' wharfage rights are separate and distinct rights and the latter do not automatically derive or result from the former.

10. Navigable Waters

Right of navigation is a public right which all jurisdictions respect and which is superior to the right of wharfage.

11. Indians

Treaty of the Upper Missouri, which includes provision "that the navigation of all lakes and streams shall be forever free to the citizens of the United States" does not speak to riparian rights below the high-water mark of any navigable lake or stream and does not give abutting landowners the riparian right of wharfage. Treaty with the Blackfoot Indians, 11 Stat. 657.

12. Treaties

While the power to abrogate treaty rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.

13. Indians

Although statutes terminating or limiting Indian treaty rights should not be construed narrowly, the courts cannot ignore the intention of Congress where it is perfectly plain.

14. Courts

Nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law.

15. Navigable Waters

The United States holds title to the bed and banks of navigable waters in trust for future states and, upon

admission of a state to the union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters.

16. Courts

State law is not applicable to determination of riparian rights with respect to the bed and banks below the high-water mark of the south-half of the Flathead Lake as such land is held by the United States in trust for the tribes on the Flathead Reservation. Treaty of Hellgate, 12 Stat. 975.

17. Navigable Waters

Right of access to abutting water is a property right and may be exercised by constructing a wharf, pier, or dock over the intervening tidelands to the navigable waters.

18. Indians

While a state has legal title to the beds and banks of its navigable waters, Indian tribes do not have title to such lands within their reservation.

19. Indians

Congress has the power to grant title or rights in the bed and banks of Flathead Lake as well as any other interest in Indian trust lands.

20. Indians

Authority of the federal government is superior to that of an Indian tribe.

21. Statutes

Interpretations of a law by the agency responsible for its enforcement are to be given deference by the courts.

22. Indians

Two letters, written by acting commissioner of Indian affairs, which indicated that Indian tribes on the Flathead Reservation had complete authority to regulate the use of lake bed below the high-water mark were not persuasive on that issue where the letters did not consider the federal common-law principles with respect to access and wharfage, nor the effect of prior allotments and conveyances of riparian lands pursuant to the Allotment Acts.

23. Indians

Mere fact that certain lake bed lands are held in trust by the United States for the benefit of Indian tribes did not compel the conclusion that federal common law with respect to riparian rights is not applicable.

24. Indians

Federal law, and not Indian tribal law, governs riparian rights with respect to navigable waters on the Indian reservation.

25. Indians

By means of the General Allotment Act, and the amendments thereto, Congress has expressed an intent to exercise its dominant power over Indian lands by dividing and conveying those lands, including lands riparian to Flathead Lake, in fee to Indians and non-Indians. Act April 23, 1904, 33 Stat. 302.

26. Indians

Although riparian rights were not implied in the Hellgate Treaty or the Treaty of the Upper Missouri, there is nothing in either treaty which would preclude Congress from granting riparian rights to an Indian allottee and his assigns. Treaty with the Blackfoot Indians, 11 Stat. 657; Treaty of Hellgate 12 Stat. 975; Act April 23, 1904, 33 Stat. 302.

27. Indians

Congress intended that fee patents issued pursuant to allotment acts which affected Flathead Reservation would include the customary riparian rights of access and wharfage even though Congress did not expressly delineate those rights. Act April 23, 1904, 33 Stat. 302; Act May 29, 1908, 35 Stat. 444; Act April 12, 1910, 36 Stat. 296.

28. Indians

It is not necessary for Congress to specify every incident of ownership which accompanies a patent to lands on an Indian reservation.

29. Indians

In determining whether there was an intent to grant riparian rights in connection with the issuance of a patent pursuant to the Indian allotment acts, it is the intent of Congress, rather than the Department of the Interior, which is controlling.

30. Indians

Limitation of Actions

There is no statute of limitations, and the doctrine of laches is not applicable, with respect to rights of Indians

to assert that patents issued pursuant to the Indian allotment acts did not include riparian rights.

Richard A. Baenen of Wilkinson, Cragun & Barker, Washington, D. C., and Victor F. Valgenti, Missoula, Mont., for plaintiffs.

Poore, McKenzie, Roth, Robischon & Robinson, Butte, Mont., for defendants.

Christian, McCurdy, Ingraham & Wold, Polson, Mont., for Intervenor City of Polson.

Boone, Karlberg & Haddon, Missoula, Mont., for the Flathead Lakers, Inc.

JAMESON, District Judge.

The plaintiffs, The Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and Harold W. Mitchell, Jr., chairman of the Tribal Council, instituted this action for declaratory and injunctive relief against the defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen, the owners of land located in Polson, Montana on the south half of Flathead Lake, which is a part of the Flathead Indian Reservation. Plaintiffs seek a judgment declaring that "the defendants are in trespass upon plaintiffs' land to the extent that they maintain and have erected buildings and structures beyond the high water mark * * * of Flathead Lake and encroach

on the bed and banks of said Lake".[1] They ask the court to enjoin all further trespass and that "defendants be directed to immediately remove all buildings and structures, including landfills, that extend beyond" the high water mark and that the lands below the high water mark "be restored to their original condition".

Defendants filed a motion to dismiss for failure to state a claim. Plaintiffs filed a motion for summary judgment. The City of Polson was permitted to intervene and filed an answer.[2] Flathead Lakers, Inc. was granted leave to file a brief as amicus curiae.[3]

At a hearing on March 22, 1974 the parties agreed upon most of the facts essential to a determination of the pending motions and were granted time for further discovery and supplemental briefs. The court suggested that the motion of the defendants to dismiss be considered a motion for summary judgment. The defendants and inter-

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[1]The complaint alleged a high water mark "elevation of 2893.2 feet". The parties were unable to agree upon the elevation. At a hearing on March 22, 1974 plaintiffs agreed that for the purpose of this action any reference to a stated elevation "should be considered altered to merely state at the high-water mark at whatever it may be".

[2]The motion to intervene recited, *inter alia*, that the City of Polson owns land fronting the south half of Flathead Lake, on which it has developed a recreational area, with public docks used for swimming and boating; that the dock is located on land between high and low water marks of the Lake; that the City has levied taxes against the dock, boat house and wharf facilities of the defendants.

[3]An affidavit in support of the petition to file brief recited that The Flathead Lakers, Inc., is a non-profit corporation having in excess of 2,000 members, with a very substantial part of the members owning real property fronting on the shores of the south half of Flathead Lake.

vener[4] have now agreed that their motions to dismiss may be considered as motions for summary judgment pursuant to the provisions of Rules 12(b) and 56 of the Federal Rules of Civil Procedure.

All parties have conducted extensive discovery and have filed comprehensive and well considered briefs. The court is satisfied that there is no genuine issue as to any material fact with respect to the primary issue of whether the defendants as owners of property riparian to the south half of Flathead Lake have the riparian rights of access and wharfage.

Statement of Facts

The following facts are not disputed by any of the parties:

(1) The plaintiff Tribes are a confederation of American Indian Tribes organized pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., with a governing body recognized by the Secretary of the Interior. The plaintiff Mitchell is an enrolled member of the Tribes and is chairman of the Tribal Council.

(2) The Flathead Reservation was created pursuant to the Treaty of Hellgate, July 16, 1855, 12 Stat. 975, reserving for the plaintiff Tribes the land embraced by the following boundaries:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork

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[4]The answer of the City of Polson included a motion to dismiss for failure to state a claim.

between the Camash and Horse prairies; thence northerly to, and *along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake;* thence on a due east course to the divide whence the Crow, the Prune, the so-ni-el-em and the Jocko Rivers take their rise, thence southerly along said divide to the place of beginning." (Emphasis added).

(3) In 1908 the United States, pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, allotted to Antoine Morias (Indian Allotment No. 1378) the following lands within the Reservation:

> "The Lot one, the east half of the Lot two, and the south east quarter of the southeast quarter of section three in Township twenty-two north of Range twenty west of the Montana Meridian, Montana, containing seventy-five and forty-two-hundredths acres."

These lands are riparian to the south half of Flathead Lake, which is a navigable body of water. The south half of Flathead Lake was included in the lands reserved to the Tribes by the Treaty of Hellgate.

(4) The defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen are the owners in common through successive conveyances of portions of the Morias allotment described as the east half of Lot 2, Section 3, Township 22 North, Range 20 West, Montana Principal Meridian.

(5) The defendant James M. Namen operates a business known as Jim's Marina, Polson, Montana on these riparian lands, and "as proprietor of Jim's Marina has erected and maintained certain buildings and structures which extend beyond the high-water mark of the lake and encroach on the bed and banks of Flathead Lake". Among

the structures which extend beyond the high water mark are: (a) docks, wharves and piers; (b) a breakwater built in 1973; and (c) a storage shed.

(6) The breakwater extends for some distance into the lake below high water mark. "The width of the breakwater from water line to water line is approximately 16 feet, and the sides of the breakwater descend at an angle so that the width of the breakwater along the bed of the lake is in excess of 16 feet."

(7) The marina and assorted structures that encroach on the bed and banks of the lake below high water mark are utilized for business or commerce in connection with Flathead Lake.

(8) During the period from "around the turn of the century into at least the 1920's, Flathead Lake was used at various times and on various occasions for commerce; • • • boats and related water vehicles traveled the lake from one end to the other."

(9) Wild Horse and Cromwell Islands lie within the south half of Flathead Lake. All lands on Wild Horse Island were conveyed under the allotment act of 1904 (33 Stat. 302) as amended.

For the purpose of considering the pending motions the court also concludes as a matter of law:

[1] (1) The land within the original boundaries of the reservation, including the land owned by the defendants and the south half of Flathead Lake, is still part of the Flathead Reservation.[5]

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[5]It is clear from Mattz v. Arnett, 412 U. S. 481, 93 S. Ct. 2245, 137 L. Ed. 2d 92 (1973) and 18 U. S. C. 1151, that all lands

(Continued on following page)

[2, 3] (2) The allotment of Antoine Morias conveyed title only to the high water mark of Flathead Lake, and the high water mark is the boundary of the defendants' property.[6]

[4] (3) Since the time of the Treaty of Hellgate, the United States has held and still holds the bed and banks of Flathead Lake below high water in trust for the plaintiff Tribes.[7]

(Continued from previous page)

embraced within the original boundaries of the Flathead Reservation are still part of that Reservation, even though parts of the reservation were opened to settlement by non-Indians under various land acts. The "reservation is located in four counties of the state, Missoula, Lake, Sanders and Flathead, and consists of approximately 1,250,000 acres of which 615,418 acres is trust land. The total resident membership of the tribe is 19 percent of the total population living within the exterior boundaries of the reservation." Security State Bank v. Pierre, 511 P. 2d 325, 326 (Mont. 1973).

[6]As was stated in *Montana Power Co. v. Rochester*, 127 F. 2d 189, 192 (9 Cir. 1942), a case involving a boundary dispute on Flathead Lake: "The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark".

[7]As the court said in *Rochester, supra* at 191, "Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the confederated tribes." The defendants admit for the purpose of their own motion that the United States holds title to the bed and banks of Flathead Lake below the high water mark in trust for the Tribes. Questioning the rationale of *Rochester*, defendants refuse to make this admission for the purpose of plaintiffs' motion. This court holds, as it did in United States v. Pollmann, 364 F. Supp. 995, 999 (D. Mont. 1973), that *Rochester* is controlling.

Contentions of Parties

Defendants and intervener claim a right of access to Flathead Lake, together with the concomitant right to construct and maintain "dock, wharf and pier facilities" on the bed and banks of the south half of Flathead Lake below high water mark. They contend that the estate reserved to the Tribes in the south half of Flathead lake by the Treaty of Hellgate is not absolute. Rather, they contend, (1) the riparian rights of wharfage may be implied from provisions of the Hellgate Treaty and the Treaty of the Upper Missouri; (2) the estate reserved to the Tribes has been limited by allotment and settlement statutes which manifested a Congressional intent "to grant riparian rights which accompany lakeshore property"; and (3) the owners of lands riparian to Flathead Lake acquired under the allotment and settlement statutes are entitled to the riparian rights of access and wharf under federal common law doctrine.

Plaintiffs contend that as the beneficial owners of the bed and banks of the lake below high water mark, they have the right to control the use of that land. They argue that no rights below the high water mark were ever extended to the owners of riparian lands by either treaty or statute. Finally, they contend that federal common law principles of riparian rights are not applicable, but rather that tribal law is controlling and the Tribes have never granted riparian rights to owners of lakeshore property.

Hellgate Treaty and Treaty of Upper Missouri

Defendants contend that the riparian right of wharfage may be implied from certain provisions in the Hellgate Treaty and the Treaty of the Upper Missouri. The court cannot agree.

Article III of the Hellgate Treaty provides in part:

"That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with *free access* from the same to the nearest public highway is secured *to them;* as also the right in common with citizens of the United States to travel upon all public highways." (Emphasis added.)

[5-7] It is true, as defendants point out, that under 43 U. S. C. § 931 navigable rivers are "deemed public highways" and under 22 U. S. C. § 10 the navigable rivers and waters within the Louisiana Purchase are "public highways". However, when Article III refers to securing free access to the public highway "to them", it is not clear whether the word "them" refers to the public in general or to members of the Tribe. After providing for roads for the public convenience, the article continues with the phrase "on the other hand". The language following may reasonably be construed as referring to members of the Tribe. Doubtful expressions must be resolved in favor of the Indians. Carpenter v. Shaw, 280 U. S. 363, 367, 50 S. Ct. 121, 74 L. Ed. 478 (1930); McClanahan v. Arizona State Tax Commission, 411 U. S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1974). The provision for right of free access to public highways must therefore be found to be for the benefit of members of the Tribes.

[8] Even if "them" were interpreted to mean the general public, it would be improper to construe the term "public highway" in the Treaty as including the south half of Flathead Lake. As stated in Carpenter v. Shaw, *supra*,

"'The language used in treaties with the Indians should never be construed to their prejudice. If words

> be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' Worcester v. The State of Georgia, 6 Pet. 515, 582 [31 U. S. 515, 8 L. Ed. 483]. . . . And they must be construed, not according to their technical meaning, but 'in the sense in which they would naturally be understood by the Indians.' Jones v. Meehan, 175 U. S. 1, 11 [20 S. Ct. 1, 44 L. Ed. 49]." *Id.*

The court agrees with the plaintiffs that to construe public highway to include the southern half of Flathead Lake "requires a finding that the unlettered Indians in 1855 understood 'road' to mean 'water' and that one of the 'roads' that *might* be run through their Reservation was already there and was 180 square miles large". Such an interpretation is clearly forbidden by *Shaw* and numerous subsequent decisions.

The Treaty of the Upper Missouri, 11 Stat. was entered into on October 17, 1855 (three months subsequent to the Hellgate Treaty) between the United States and a number of tribes, including the Flathead, Upper Pend d'Oreilles and Kootenai.[8]

Article VIII of the Treaty provides:

> "For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this

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[8]While the Flatheads and Nez Perce tribes were parties to this treaty, it was concerned primarily with the establishment of the Blackfeet Reservation, "the definition of [its] boundaries, the prevention of disputes among the tribes, and the establishment of peace". Colliflower v. Garland, 342 F. 2d 369, 371 (9 Cir. 1965). See also Blackfeet and Gros Ventre Tribes, 127 Ct. Cl. 807, 809, 119 F. Supp. 161, 162 (1954), cert. denied, 348 U. S. 835, 75 S. Ct. 58, 99 L. Ed. 658 (1914).

> treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description . . . *and that the navigation of all lakes and streams shall be forever free to citizens of the United States.*" (Emphasis added.)

[9-11] Defendants contend that this provision, especially the last clause, supports their claim to the riparian right of wharfage. This provision, however, is nothing more than a recognition of the public's right of navigation. The public's right of navigation and the riparian owner's wharfage rights are separate and distinct rights. The latter do not automatically derive or result from the former. The right of wharfage is a private right which is not everywhere recognized, whereas the right of navigation is a public right which all jurisdictions respect and which is superior to the right of wharfage. See Yates v. Milwaukee, 77 U.S. 497, 19 L.Ed. 984 (1871); 1 Wiel, Water Rights in the Western States, Section 904, p. 942 (3rd ed. 1911); 1 Clark, Waters and Water Rights, Section 37.2 (c) pp. 209-210 (1967). The court agrees with plaintiffs that the Treaty of the Upper Missouri "does not speak to riparian rights below high water mark of any navigable lake or stream", and although it "might be applicable to a boating case involving Flathead Lake, here • • • it is irrelevant".

Effect of Allotment Acts and Other Congressional Enactments

[12, 13] Defendants next argue that, under the General Allotment Act of 1887 and the 1904 Allotment Act and its numerous amendments, it is evident "that Congress intended those owners fronting on the lake to own and pos-

sess all water rights in and to Flathead Lake which a normal riparian owner would possess", and that these riparian rights include the right to erect boating and wharf facilities. In determining the effect of the Congressional Acts it is recognized that while the power to abrogate treaty rights exist, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress". Pigeon River Co. v. Cox Co., 291 U. S. 138, 160, 54 S. Ct. 361, 367, 78 L. Ed. 695 (1934), quoted in Menominee Tribe v. United States, 391 U. S. 404, 413, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968). On the other hand, although statutes terminating or limiting treaty rights "should be construed narrowly", the courts "cannot ignore the intention of Congress where it is perfectly plain". United States v. Seaton, 101 U. S. App. D. C. 234, 248 F. 2d 154, 155 (1957).

With the enactment of the General Allotment Act of 1887 (24 Stat. 388) the Federal Government commenced a general policy of alloting tribal lands within the various reservations to individual Indians. Generally, this system provided for the grant of a specified number of acres, with the grant held in trust for a period of 25 years, after which the allottee was issued a patent in fee. The Act authorized the Secretary of the Interior to prescribe rules and regulations deemed necessary to secure a joint and equal distribution of waters for irrigation, whether or not the lands were riparian. See United States v. Power, 305 U. S. 527, 533, 59 S. Ct. 344, 83 L. Ed. 330 (1939).

The allotment system was specifically applied to the Flathead Reservation by the Act of April 23, 1904, 33 Stat. 302, which provided for the survey and allotment of the lands within the Reservation and the sale and disposal of surplus lands remaining after allotment. Following

allotment, a commission was appointed by the President to inspect, appraise and value unallotted lands and to classify the lands as agricultural, timber, mineral or grazing lands. The unallotted lands were then open to settlement and entry by Presidential proclamation and disposed of "under the homestead, mineral, and town-site laws of the United States" which speak of "rights to the use of water for mining, agricultural, manufacturing, or other purposes". 30 U. S. C. § 51.

The Allotment Act of 1904 was subsequently amended on a number of occasions to further implement the policy of allotment and settlement on the Flathead Reservation.[9] The Act of June 21, 1906, 34 Stat. 325, 354 provided for the surveying and platting of town-sites at various settlements within the Reservation, and added Section 19 to the 1904 Act to provide that nothing in the Act should be construed to deprive "any of said Indians, or said persons or corporations to whom the use of land is granted by the Act" of water appropriated and used for irrigation and domestic purposes.

By the Act of May 29, 1908, 35 Stat. 444, Congress provided that allotted lands "which can be sold under existing law * * * may be sold on the petition of the allottee", and "That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold * * * ."

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[9]The Act was amended in 1905, 33 Stat. 1048, 1081 to provide for a grant to the State of Montana for the use of the University of Montana for biological station purposes. That station is located on the banks of the south half of Flathead Lake.

In the Villa Sites Act of 1910, 36 Stat. 296-297, Section 23 was added to the 1904 Act, providing for the survey and subdivision into two to five acre lots of "all of the unallotted lands fronting on Flathead Lake * * * that are embraced within the limits of the Flathead Indian Reservation" and for sale thereof "to the highest bidder at public sale". An advertising circular issued by the Department of the Interior in connection with the sale of the Villa Sites stated that "The lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." This circular also recited that "Trains from Kalispell, on the Great Northern Railway, connected Somers for the morning trips of the steamers over the lake to Polson, and from Somers to Big Arm by way of Dayton, Elmo, and many other wharf landings on the western shore." [10]

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[10]The Report of the Committee on Indian Affairs on Senate Bill 3983, the Villa Sites Act, submitted by Senator Dixon of Montana, reads in pertinent part:

> "The Flathead Indian Reservation has been surveyed and allotments made to all of the Indians holding tribal relations with the Flathead Indians. The bill in question proposes to survey and subdivide into small lots for summer-residence sites the entire unallotted lands fronting on Flathead Lake, the proceeds from the sale of these lots to be used in furthering the reclamation of the allotted Indians' lands which is now being carried on. The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands, opening them to settlement. * * * Your committee is of the unanimous belief that the proposed legislation is most meritorious and for the benefit of the Flathead Indians." Sen. Rep. No. 17, 61st Cong. 2d Session.

The Act of 1904 was amended in 1911 (36 Stat. 1066) and 1912 (37 Stat. 527) to provide that patents for all tracts of land on Flathead Lake should be subject to easements for storage for irrigation or development of water power. A further amendment in 1919 (40 Stat. 1203) provided that the Secretary of the Interior designate surplus lands bordering on streams within the Flathead Reservation as "valuable for stock-watering purposes", and dispose of the lands under the terms of the 1904 Act.[11]

None of the Acts, or amendments thereto, in express terms grant riparian rights to the owners of the lake frontage property.[12] Nor do they contain any express reservation or exception with respect to these rights. The crucial question then is whether these acts, when viewed in the context of long established common law principles governing riparian rights, indicate that Congress intended the grants of riparian lands pursuant to the allotment acts to convey the rights of access and wharfage.

Applicability of Federal Common Law Rules with Respect to Riparian Wharfage Rights on Navigable Waters

[14-16] The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2)

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[11]The allotment system and policy of settlement of unallotted lands was terminated by Congress in the Wheeler-Howard (Indian Reorganization) Act of June 18, 1934, 48 Stat. 984, under which the Tribes were organized.

[12]The express provisions in all of the Acts relating to water rights are concerned with the use of water for agriculture, mining, manufacturing or power purposes.

upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. See Shively v. Bowlby, 152 U. S. 1, 48-49, 14 S. Ct. 548, 38 L. Ed. 331 (1894). The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

The federal common law with respect to the riparian rights of access and wharfage is clear. Following a long line of earlier cases, the Supreme Court in United States v. River Rouge Improvement Co., 269 U. S. 411, 418, 46 S. Ct. 144, 146, 70 L. Ed. 339 (1926) stated:

> "It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, Shively v. Bowlby, 152 U. S. 1, 40 [14 S. Ct. 548, 38 L. Ed. 331], he (the riparian owner) has, in addition to the rights common to the public, *a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stre m, and when not forbidden by public law may construct landings, wharves or piers for this purpose.*" (Citations omitted), (emphasis added).

There are few decided cases involving the riparian rights of access and wharfage as they relate to federally held beds of navigable waters. Those cases which have considered the question, however, consistently recognize these riparian rights.

In Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 683, 3 S. Ct. 445, 27 L. Ed. 1070

(1884) the Supreme Court, quoting from Yates v. Milwaukee, *supra* (77 U. S. 497, 10 Wall. 497, 19 L. Ed. 984 at 986), stated that among the rights to which a riparian owner on the navigable Potomac River is entitled are:

> "'Access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public whatever those may be.'" [13]

[17] This same rule was applied in the former Territory of Alaska. As was stated in Ketchikan Spruce Mills v. Alaska Concrete Prod. Co., 113 F. Supp. 700, 701-702 (D. Alaska 1953): "It is well established that a right of access • • • is a property right and may be exercised by constructing a wharf, pier or dock over the intervening tide lands to the navigable waters." [14]

Plaintiffs do not question the existence or propriety of these federal common law rules, but argue that they are not applicable because: (1) the Tribes, like states, have control over the beds and banks of navigable waters, and the "Tribes have not authorized the erection or maintenance of defendants' structures . . ."; (2) "The United States, acting in its supervisory capacity as trustee, has

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[13] See also Martin v. Standard Oil of New Jersey, 91 U. S. App. D. C. 84, 198 F. 2d 523, 526 (1952); United States v. Groen, 72 F. Supp. 713, 720 (D. D. C. 1947); and United States v. Belt, 79 U. S. App. D. C. 87, 142 F. 2d 761, 767 (1944).

[14] See also Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966, 970 (9 Cir. 1916); Dalton v. Hazelez, 182 F. 561, 573 (9 Cir. 1910); Decker v. Pacific Coast S. S. Co., 164 F. 974, 976 (9 Cir. 1908); and Columbia Canning Co. v. Hampton, 161 F. 60, 64 (1908).

consistently recognized the Tribes' • • • right to assert full jurisdiction and control over wharfage rights along the lake;" (3) the lands involved are Indian trust lands which the Treaty of Hellgate reserved for the "exclusive use and benefit" of the Tribes; and (4) in allotting and authorizing the conveyance of tribal lands, Congress did not expressly grant riparian rights and such a grant cannot be implied.

(1) Applicability of Tribal Law

Plaintiffs contend that tribal law and not federal law governs the use of the bed and banks of the south half of Flathead Lake. This contention is based in part upon a suggested analogy to the rule of Shively v. Bowlby, *supra*. According to *Shively*, prior to admission of a state into the Union, the beds and banks of navigable waters are held by the United States in trust for the future state. Upon admission, the new state receives full legal ownership of the beds and banks of its navigable waters. As a result, state law governs the questions of ownership, use and control of the bed, including wharfage rights. Plaintiffs argue that the Tribes stand in the same position as a state with respect to the ownership and control over the bed and banks of the south half of Flathead Lake.

[18, 19] The analogy, however, is faulty. While a state has legal title to the bed and banks of its navigable waters, the Tribes do not. Rather, title to the bed and banks of the south half of Flathead Lake is held by the United States in trust for the Tribes. Congress has the power to grant title or rights in the bed and banks of the Lake as well as any other interests in Indian trust

lands. Congress has no such power *vis-a-vis* the states. Moreover, barring Congressional action, the Tribes can never secure legal ownership as a state does. If analogies are to be drawn, therefore, the Tribes' position is more nearly that of a territory than of a state. Applying the principles of *Shively*,[15] *Potomac Steamboat Co.*, and *Ketchikan Spruce Mills*, the court concludes that federal law is applicable. As discussed *supra*, the federal courts have consistently recognized the riparian rights of access and wharfage with respect to federally held beds and banks of navigable waters.

Plaintiffs, in their reply brief of February 12, 1974 further buttress their argument that tribal law is controlling by quoting extensively from McClanahan v. Arizona State Tax Commission, *supra*. There the Court discussed at length the Indian sovereignty doctrine, reaffirming prior holdings that the Federal Government has largely permitted the Indians "to govern themselves, free from state interference", and that the Indian reservations were meant to establish the "exclusive sovereignty" of the Indians "under general federal supervision". Plaintiffs recognize that *McClanahan* was concerned with the applicability of state law to a reservation and its Indian inhabitants, a question not here presented, but argue that the principles there enunciated are fully applicable.

[20] The court cannot agree. In the complex, and sometimes uncertain, area of Indian law, care must be exercised in attempting to apply language used in one

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[15]Shively v. Bowlby, recognizes the right of the United States to grant title or rights in the land below the high water mark of navigable waters prior to statehood.

factual situation in a totally different context. *McClanahan* was concerned with the right of a state to impose a tax upon income earned by an Indian on a reservation. Here we are concerned with the rights of both individual Indians and their non-Indian grantees under grants by the Federal Government pursuant to Congressional action. There can be no doubt that the authority of the Federal Government is superior to that of the Tribe.[16] Congress was exercising that authority in enacting the Allotment Acts. We are concerned then with the intent of Congress with respect to riparian rights in providing for the allotment and sale of lands fronting on a navigable lake.

(2) Federal Recognition of Tribal Jurisdiction

[21, 22] In support of their contention that no riparian rights of the nature claimed by defendants were conveyed by the Federal Government, plaintiffs direct the court to two letters—one dated August 16, 1955 from the Acting Commissioner of Indian Affairs to Senator Mansfield, and the other dated February 18, 1959 from an Assistant Commissioner to the chairman of the Tribal Council.[17] Both letters concern the right of the Tribes to grant

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[16]Plaintiffs "agree the United States has a power paramount to that of the Tribes over tribal lands and waters and the United States, by clear Act of Congress, can exercise that power to the derogation of the tribal power". They contend, however, that "here the United States has not so acted, and therefore, the power to regulate the use of tribal land and water resided unimpaired in the Tribes". (Plaintiffs' Supplement Memorandum filed May 15, 1974).

[17]The first letter recites that under *Rochester* the title to the bed and banks of the south half of Flathead Lake below high water mark "is in the United States in trust for the Con-

(Continued on following page)

leases or permits for the use of lands below high water mark on the south half of Flathead Lake. They indicate that the Tribes have complete authority to regulate the use of those lands. While it is true that *interpretations* of a law by the agency responsible for its enforcement are to be given deference, Udall v. Tallman, 380 U. S. 1, 18, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965), the letters are not persuasive. Both letters were written almost a half century after the initial allotments and conveyances of the land.[18] Neither letter considers the federal common law principles with respect to access and wharfage. Nor does either letter deal expressly with the effect of prior allotments and conveyances of riparian lands pursuant to the Allotment Acts. More persuasive in determining Congressional intent is the legislative history of the Villa Sites Act (see note 10), as well as the bulletin issued by the Secretary of the Interior in connection with the sale of the Villa Sites, stating that Flathead Lake "is utilized for bathing, sailing, boating, and yachting, and several steam boats ply between the various towns upon its bor-

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(Continued from previous page)

federated Tribes," and that "It is therefore within the power of Confederated Tribes to lease these drawdown lands * * *". The second letter similarly states that title of the lands is in the United States in trust for the Indians and that "either leases or permits may be used in granting the use of tribal lands for dock sites or piers, across the flowage easement and into the permanent lake pool".

[18]Moreover, it appears from affidavits of Namen and one of his predecessors in interest that at least since 1948 "the shore and banks thereof" have been used for "docks, wharf and pier purposes". An affidavit filed by Intervener, City of Polson, recites that a lumber mill was constructed in 1909 on allotted land "located about 100 yards from the West boundary line of the Morias allotment", and that "lands between the high water mark of and the bed of Flathead Lake were utilized for log storage, saw mill tramways, and lumber shipping docks".

ders. The shores are well adapted for boat landings and the erection of wharves." [19]

Plaintiffs also argue that the State of Montana has recognized the Tribes' right to control the bed of Flathead Lake, since on two occasions when the State built bridges crossing Flathead Lake and River it applied for rights-of-way to cross the Lake and River beds and paid damages therefor. Plaintiffs point out also that, although Congress gave the Secretary of the Interior the power to grant rights-of-way across Indian land, it also provided that such grants may not be made across lands of tribes organized under the Indian Reorganization Act "without the consent of the proper tribal officials". 25 U. S. C. §§ 324 and 325. We are not concerned, however, with rights of the State of Montana or with bridges or rights-of-way, but rather with rights acquired by Indians and their grantees through allotments prior to the Indian Reorganization Act of 1934, which terminated the allotment policy.

(3) Effect of Status of Indian Trust Land

[23, 24] Plaintiffs' next contend that the federal common law principles are inapplicable because the lands involved are Indian trust lands which have been reserved

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[19] It is true, as plaintiffs state, that the circulars referred specifically to the Villa Sites, and we are here concerned with riparian rights of a portion of an allotment made prior to the Villa Sites Act. The patents issued pursuant to the Villa Sites Act, however, contain the same provisions as those under the 1904 Act. Neither made any express reference to riparian rights, and neither contained any reservation or exception with respect to those rights. As set forth in the two letters (note 17), patents issued under both acts were subject to flowage easements for storage of water for irrigation or development of water power, pursuant to the Acts of March 3, 1911 and August 24, 1912.

for the "exclusive use and benefit" of the Tribes. The mere fact that the lands are held in trust does not compel the conclusion that federal common law is not applicable. The beds of navigable waters within the former Territory of Alaska were, according to the rationale of *Shively, supra,* held by the United States in trust for the State of Alaska, (Dalton v. Hazelez, *supra,* 182 F. at 572) and the beds of navigable waters within the District of Columbia are likewise "vested in the United States for the benefit of the people". United States v. Groen, *supra* 72 F. Supp. at 719. Yet, as discussed *supra,* the courts in both instances have recognized the private rights of wharfage and access in riparian proprietors. The fact that the lands were held in trust for Indians, therefore, is not in itself compelling, particularly in view of the power of Congress to grant titles which include these rights. The Federal Government in any event holds title, and it is federal law that applies.

It is true, as plaintiffs point out, that Article II of the Hellgate Treaty sets apart the Flathead Reservation for "the exclusive use and benefit" of the Tribes. As previously noted, however, the exclusivity of the Reservation has been sharply limited by the allotment of its lands to individual Indians, the provisions that allotted lands could be sold to non-Indians, and the massive settlement of surplus unallotted lands by non-Indians.[20] While the Flathead Reservation continues to exist, and the land within its original exterior boundaries is still Indian country, it would defy reality to hold that the entire Reserva-

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[20]As indicated in note 5, less than half of the Flathead Reservation is now trust land, and members of the Tribes comprise less than 20 per cent of the population living within the exterior boundaries of the Reservation.

tion presently exists for "the exclusive use and benefit" of the Tribes.

(4) Failure to Expressly Grant Riparian Rights

With respect to their final contention—that because riparian rights were not expressly granted by Congress they cannot be implied—plaintiffs raise two fundamental principles of Indian law: (1) Only Congress has the power to abrogate Indian property rights (See Lone Wolf v. Hitchcock, 187 U. S. 553, 565-566, 23 S. Ct. 216, 47 L. Ed. 299 (1903)); and (2) statutes in derogation of Indian property rights, must be narrowly construed. See Menominee Tribe of Indians v. United States, *supra*.

[25] The court of course recognizes these standards. There can be no question, however, that by means of the General Allotment Acts and the amendments thereto, the Congress expressed an intent to exercise its dominant power over Indian lands by dividing and conveying those lands, including lands riparian to Flathead Lake, in fee to Indians and non-Indians. Moreover, as discussed previously, the United States Government, decades before the allotment acts were passed, had taken the position that the riparian rights of access and wharfage were property rights, i.e. incidents of ownership of those holding land riparian to navigable waters.[21] In each case in which title to the bed and banks of navigable rivers is held by the Federal Government, the courts have held that riparian owners have the rights of access and wharfage.

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[21]Dutton v. Strong, 66 U. S. 23, 31, 1 Black 23, 17 L. Ed. 29 (1861); Yates v. Milwaukee, 77 U. S. 497, 504 (10 Wall. 497) 19 L. Ed. 984 (1871).

Potomac Steamboat Co., supra; Ketchikan Spruce Mills, supra.

[26] Did Congress intend that the fee patents to allottees and purchasers of lakeshore property would include the riparian rights of access and wharfage? In that determination it is of course necessary to consider all of the treaties,[22] statutes and cases cited by the respective parties, as well as the undisputed facts. As the court said in Stevens v. C.I.R., 452 F. 2d 741, 744 (9 Cir. 1971), "Federal policy toward particular Indian tribes is often manifested through a combination of general laws, specific acts, treaties, and executive orders. All must be considered in pari materia in ascertaining congressional intent. Kirkwood v. Arenas, 9th Cir. 1957, 243 F. 2d 863, 867."

None of the parties have cited, nor has the court found, any case which has considered the precise question here presented, i.e. whether the owners of riparian property on navigable waters, acquired from the United States as trustee for an Indian tribe, have the riparian rights of access and wharfage. Defendants rely in part upon cases in which the courts have applied common law rules in other contexts in determining the rights of allottees and other grantees of Indian lands. In *Rochester, supra,* the court applied the "general rule" which "has its roots in the principle of the common law" in holding that "patents of the United States to lands bordering on navigable wa-

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[22]Although the court has rejected defendants' contention that riparian rights were implied in the Hellgate Treaty and Treaty of the Upper Missouri, there is nothing in either treaty which would preclude Congress from granting these rights to an Indian allottee and his assigns.

ters, in the absence of special circumstances, convey only to high water mark". 127 F. 2d at 192.

In Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922), the Court, dealing with lands once part of an Indian reservation, applied common law doctrine in holding that patents to lands riparian to non-navigable streams convey title to the middle of the stream. In Fontenelle v. Omaha Tribe of Nebraska, 430 F. 2d 143 (8 Cir. 1970), the owner of a former Indian allotment sued to quiet title to land formed when the Missouri River receded from its meander line. The court affirmed the district court's application of "the general rule that land added by accretion to tracts which were riparian at the time of the official survey and plat is the property of the riparian owner". *Id.* at 147.

The court agrees with plaintiffs that these and other cases cited by defendants are not precisely in point since they deal with boundaries and accretion, questions usually determined by federal law even where riparian rights are determined by state law. Bonelli Cattle Company v. Arizona, 414 U. S. 313, 94 S. Ct. 517, 523, 38 L. Ed. 2d 526 (1973).[23] The cases are significant, however, in that they stand for the propositions that: (1) federal common law is applied to determine the extent of federal grants of

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[23] *Bonelli* merely reiterates the general rule that the extent of a federal grant on a navigable stream is a federal question demanding the application of federal law, while the nature of the rights of riparian owners in the bed and banks of navigable streams is a state determination. That is because title to the bed and banks of navigable water is vested in the states upon statehood. Prior to the admission of a state, title to the bed and banks of navigable streams was held in trust by the Federal Government and federal law was determinative of the rights of riparian owners. See, *Potomac Steamboat Co., supra.*

Indian land; (2) express Congressional language is not considered a prerequisite to the application of federal common law principles to federal grants of tribal lands; and (3) the fact that Indian land is involved does not necessitate the application of different principles in determining the extent of a federal grant.

Conclusion

Thus, an analysis of the relevant case law firmly establishes two principles:

(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent. This was established as early as 1861 in Dutton v. Strong, *supra*, and consistently followed in many subsequent cases.

(2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect.

[27-29] Given these principles, this court cannot escape the conclusion that Congress must have intended that the fee patents issued pursuant to the Act of April 23, 1904 would include the customary riparian rights of access and wharfage. The fact that Congress did not expressly delineate these rights does not negate their existence. It was not necessary for Congress to specify every incident of ownership which accompanies a patent to lands on an Indian Reservation.

This conclusion is confirmed by the Senate Report on the Villa Sites Act in 1910 and the circular issued by the Department of the Interior.[24] Certainly, without the rights of access and wharfage, lands riparian to the south half of Flathead Lake would not have been considered as valuable as suggested in the report and circular.

[30] It is significant also that for more than half a century the defendants and other riparian owners, with the full knowledge of the Federal Government and the Tribes,[25] and without objection from either, expended large sums of money for docks and wharves abutting their lands on the south half of Flathead Lake. Many persons built and maintain homes and business enterprises. Wharves and piers were constructed, boats and ships plied their way through the area, and commerce was carried on.

Now, after more than fifty years of such activity on the Lake, plaintiffs claim that the riparian owners who have constructed piers and wharves beyond the high water mark are trespassers, should be enjoined from further trespass, and be requested to move immediately all build-

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[24]The court agrees with plaintiffs that it is the intent of Congress rather than the Department of the Interior which is controlling, but it has long been recognized that the Secretary of the Interior is the executive arm of the Government to execute the declared Congressional policy with the Indians.

[25]It is of course clear that there is no statute of limitations, and the doctrine of laches is not applicable. The long recognition of the riparian rights of the defendants and others does suggest, however, that the Department of the Interior assumed a Congressional intent that the patents include riparian rights.

ings and structures beyond the high water mark.[26] To grant this relief in the light of the factual and legal considerations set forth above, would be a grievous injustice to the defendants and others in a similar position.

The court, therefore, concludes that the defendants as owners of lands riparian to the south half of Flathead Lake are entitled as a matter of law to access to the lake. Concomitant with that right of access is the right to wharf out to navigable water. Plaintiffs' motion for summary judgment is therefore denied. Defendants' motion for summary judgment is granted insofar as the existence of the riparian rights of access and wharfage are concerned.[27]

There remains for determination the question of whether any of the structures owned and maintained by the defendants constitute an abuse of the riparian rights. Plaintiffs contend that "at least some of the structures, including a building and a land-fill extending into the Lake, are not of the type permitted and exceed the limits normally held proper for riparian owners". This question cannot be resolved on the basis of the undisputed facts. As to this issue a further hearing will be required.

Defendants will prepare, serve and file a draft of partial summary judgment in conformance with this order.

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[26]Apparently defendants first received official notice of a claim of trespass in May, 1973. There may have been prior informal notice. The letters written by the Commissioner of Indian Affairs, upon which plaintiffs rely, were dated in 1955 and 1959, but as noted *supra*, neither letter expressly considered the question of riparian rights. In any event, there is nothing in the record to suggest any action by the Government or the Tribes prior to May, 1973.

[27]In view of this conclusion, it is unnecessary for the purpose of this order to consider the contention of the respective parties with respect to a temporary injunction or the sufficiency of plaintiffs' answer to some of defendants' interrogatories.

APPENDIX B

The CONFEDERATED SALISH AND KOOTENAI TRIBES et al.,
Plaintiffs-Appellants,

v.

James M. NAMEN et al., and City of Polson, a Montana Municipal Corporation,
Intervenor, Defendants-Appellees.

No. 75-1106.

United States Court of Appeals,
Ninth Circuit.

May 12, 1976.

Appeal from the United States District Court for the District of Montana; William J. Jameson, Judge.

Richard A. Baenen (argued), of Wilkinson, Cragun & Barker, Washington, D. C., for plaintiffs-appellants.

Urban Roth (argued), Butte, Mont., and Sam Haddon (argued), Missoula, Mont., for defendants-appellees.

F. L. Ingraham (argued), Ronan, Mont., for intervenor.

Glen R. Goodsell (argued), Dept. of Justice, Washington, D. C., for amicus curiae.

OPINION

Before BARNES, SNEED and KENNEDY, Circuit Judges.

PER CURIAM:

Defendant-appellee Namen owns property bordering upon Flathead Lake, within the boundaries of the Flat-

head Indian Reservation in Montana. Namen is the successor in interest to an Indian allottee who, pursuant to the Indian Allotment Act of 1904 (33 Stat. 302) and amendments thereto, obtained from the United States a patent in fee covering the lakeside property in question. In connection with his business, Namen has constructed piers, wharves, and other structures related to navigation, which extend over the bed and bank of Flathead Lake.

The City of Polson, Montana was permitted to intervene as a defendant. The city also owns lakeside property within the Reservation, from which public docks have been constructed for recreational use.

The Confederated Salish and Kootenai Tribes brought suit in the District Court, seeking a declaratory judgment that Namen's waterfront structures were in trespass upon Indian property, and seeking injunctive relief prohibiting future trespasses and requiring demolition of existing structures. The bases for the requested relief were that, allegedly, (1) the Tribes, as beneficial owners of the lake bed, have the exclusive right to control its use; (2) allotments of lakeside property were never meant to convey riparian rights; and (3) no such rights exist at present because they are not recognized in the (allegedly controlling) tribal law.

In a carefully reasoned opinion, the District Court (Judge Jameson, presiding) granted partial summary judgment in favor of defendants, recognizing the existence of their riparian rights of wharfage and access to navigable waters, but reserving judgment on the question whether existing structures abused those rights. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974).

The Tribes appeal from the adverse summary judgment. This Court's jurisdiction is predicated upon 28 U.S.C. §1292(a)(1), which allows appeals from interlocutory orders denying injunctive relief. We affirm.

The District Court concluded as a matter of law that allotments of land adjacent to the lake carried title only as far as the high-water mark of the lake, and that the United States, as trustee for the Tribes, holds title to the banks and bed of the lake. The District Court further concluded that since title to the lake bed is held by the United States, federal common law, and not state or tribal law, governs the existence of any riparian rights associated with Namen's property. Control of the lake bed was thus found to be analogous to federal trust ownership of navigable waters in territories prior to statehood.

The District Court found that riparian rights were not expressly created by either the treaty which created the Flathead Reservation (Treaty of Hellgate, 12 Stat. 975) or the statutes under which allotments of Flathead Reservation property were granted. Nevertheless, drawing support from principles of federal common law (wherein riparian rights have traditionally been recognized; *see Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672, 683, 3 S.Ct. 445, 451, 27 L.Ed. 1070, 1074 (1884)) and from the long history of navigation on Flathead Lake, the District Court concluded that Congress must have intended that grants of riparian lands under the Indian Allotment Acts should carry rights of access and wharfage. The District Court further concluded that to grant the relief requested by plaintiffs "would be a grievous injustice to the defendants and others in a sim-

ilar position." 380 F. Supp. at 466. Accordingly, partial summary judgment was granted in favor of defendants.

After a careful review of the arguments made on appeal, we have concluded that the District Court's reasoning was correct. We therefore adopt Judge Jameson's opinion below as the opinion of this court.

AFFIRMED.

APPENDIX F

Treaty Hell Gate, July 16, 1855, 12 Stat. 975

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead na-

tion, with Victor the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognize Victor as said head chief.

ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands

of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west of Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided,* That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. *And provided,* That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and

gun shop; one carpenter's shop; one wagon and plough-maker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledged their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defense, but

will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities with held from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation

provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, Governor and Superintendent Indian Affairs W. T. [L.S.]

VICTOR, Head Chief of the Flathead Nation,
his x mark. [L.S.]

ALEXANDER, Chief of the Upper Pend d'Oreilles,
his x mark. [L.S.]

MICHELLE, Chief of the Kootenays,
his x mark. [L.S.]

AMBROSE, his x mark. [L.S.]

PAH-SOH, his x mark. [L.S.]

BEAR TRACK, his x mark. [L.S.]

ADOLPHE, his x mark. [L.S.]

THUNDER, his x mark. [L.S.]

BIG CANOE,	his x mark.	[L.S.]
KOOTEL CHAH,	his x mark.	[L.S.]
PAUL,	his x mark.	[L.S.]
ANDREW,	his x mark.	[L.S.]
MICHELLE,	his x mark.	[L.S.]
BATTISTE,	his x mark.	[L.S.]

Kootenays

GUN FLINT,	his x mark.	[L.S.]
LITTLE MICHELLE,	his x mark.	[L.S.]
PAUL SEE,	his x mark.	[L.S.]
MOSES,	his x mark.	[L.S.]

James Dotty, Secretary.
R. H. Lansdale, Indian Agent.
W. H. Tappan, Sub Indian Agent.
Henry R. Crosire.
Gustavus Sohon, Flathead Interpreter.
A. J. Hoecken, Sp. Mis.
William Craig.

And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"In Execution Session,
"Senate of the United States, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and Chiefs,

Headmen and Delegates of the confederate tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

"Attest: "ASBURY DICKENS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand and eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the
[Seal.] Independence of the United States, the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, Secretary of State.

APPENDIX G

Treaty With the Blackfeet, 1855.

Articles of agreement and convention made and concluded at the councilground on the Upper Missouri, near the mouth of the Judith River, in the Territory of Nebraska, this seventeenth day of October, in the year one thousand eight hundred and fifty-five, by and between A. Cumming and Isaac I. Stevens, commissioners duly appointed and authorized, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the following nations and tribes of Indians, who occupy, for the purposes of hunting, the territory on the Upper Missouri and Yellowstone Rivers, and who have permanent homes as follows: East of the Rocky Mountains, the Blackfoot Nation, consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians. West of the Rocky Mountains, the Flathead Nation, consisting of the Flathead, Upper Pend d'Oreille, and Kootenay tribes of Indians, and the Nez Perce tribe of Indians, the said chiefs, headmen and delegates, in behalf of and acting for said nations and tribes, and being duly authorized thereto by them.

ARTICLE 1. Peace, friendship and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual.

ARTICLE 2. The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other,

and cultivate mutual good-will and friendship. And the nations and tribes aforesaid do furthermore jointly and severally covenant, that peaceful relations shall be maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defense, against the following-named nations and tribes of Indians, to wit: the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arcs, and Auncepa-pas bands of Sioux, and all other neighboring nations and tribes of Indians.

ARTICLE 3. The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof.

Provided, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the

boundary separating the Blackfoot from the Crow territory.

And provided, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements, or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting-ground.

And provided further, That the rights of the western Indians to a whole or a part of the common hunting-ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie.

ARTICLE 4. The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty. Subject, however, to the provisions of the third article of this treaty, giving the right to hunt, and prohibiting the establishment of permanent villages and the exercise of any exclusive rights within ten miles of the northern line of the common hunting-ground, drawn from the nearest source of the Muscle Shell River to the Medicine Rock Passes, for the period of ninety-nine years.

Provided also, That the Assiniboins shall have the right of hunting, in common with the Blackfeet, in the country lying between the aforesaid eastern boundary line, running from the mouth of Milk River to the forty-ninth parallel, and a line drawn from the left bank of the Missouri River, opposite the Round Butte north, to the forty-ninth parallel.

ARTICLE 5. The parties to this treaty, residing west of the main range of the Rocky Mountains, agree and consent that they will not enter the common hunting ground, nor any part of the Blackfoot territory, or return home, by any pass in the main range of the Rocky Mountains to the north of the Hell Gate or Medicine Rock Passes. And they further agree that they will not hunt or otherwise disturb the game, when visiting the Blackfoot territory for trade or social intercourse.

ARTICLE 6. The aforesaid nations and tribes of Indians, parties to this treaty, agree and consent to remain within their own respective countries, except when going to or from, or whilst hunting upon, the "common hunting ground," or when visiting each other for the purpose of trade or social intercourse.

ARTICLE 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

ARTICLE 8. For the purpose of establishing travelling thoroughfares through their country, and the better to en-

able the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.

ARTICLE 9. In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance, the United States agree to expend, annually, for the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians, constituting the Blackfoot Nation, in addition to the goods and provisions distributed at the time of signing the treaty, twenty thousand dollars, annually, for ten years, to be expended in such useful goods and provisions, and other articles, as the President, at his discretion, may from time to time determine; and the superintendent, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto: *Provided, however,* That if, in the judgment of the President and Senate, this amount be deemed insufficient, it may be increased not to exceed the sum of thirty-five thousand dollars per year.

ARTICLE 10. The United States further agree to expend annually, for the benefit of the aforesaid tribes of

the Blackfoot Nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization: *Provided, however,* That to accomplish the objects of this article, the President may, at his discretion, apply any or all the annuities provided for in this treaty: *And provided, also,* That the President may, at his discretion, determine in what proportions the said annuities shall be divided among the several tribes.

ARTICLE 11. The aforesaid tribes acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. The aforesaid tribes are hereby bound to deliver such offenders to the proper authorities for trial and punishment, and are held responsible, in their tribal capacity, to make reparation for depredations so committed.

Nor will they make war upon any other tribes, except in self-defense, but will submit all matter of difference, between themselves and other Indians, to the Government of the United States, through its agents, for adjustment, and will abide thereby. And if any of the said Indians, parties to this treaty, commit depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article in

case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 12. It is agreed and understood, by and between the parties to this treaty, that if any nation or tribe of Indians aforesaid, shall violate any of the agreements, obligations, or stipulations, herein contained, the United States may withhold, for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said nation or tribe under the ninth and tenth articles of this treaty.

ARTICLE 13. The nations and tribes of Indians, parties to this treaty, desire to exclude from their country the use of ardent spirits or other intoxicating liquor, and to prevent their people from drinking the same. Therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing such liquor into the Indian country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE 14. The aforesaid nations and tribes of Indians, west of the Rocky Mountains, parties to this treaty, do agree, in consideration of the provisions already made for them in existing treaties, to accept the guarantees of the peaceful occupation of their hunting-grounds, east of the Rocky Mountains, and of remuneration for depredations made by the other tribes, pledged to be secured to them in this treaty out of the annuities of said tribes, in full compensation for the concessions which they, in common with the said tribes, have made in this treaty.

The Indians east of the mountains, parties to this treaty, likewise recognize and accept the guarantees of this treaty, in full compensation for the injuries or depredations which have been, or may be committed by the aforesaid tribes, west of the Rocky Mountains.

ARTICLE 15. The annuities of the aforesaid tribes shall not be taken to pay the debts of individuals.

ARTICLE 16. This treaty shall be obligatory upon the aforesaid nations and tribes of Indians, parties hereto, from the date hereof, and upon the United States as soon as the same shall be ratified by the President and Senate.

In testimony whereof the said A. Cumming and Isaac I. Stevens, commissioners on the part of the United States, and the undersigned chiefs, headmen, and delegates of the aforesaid nations and tribes of Indians, parties to this treaty, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

A. Cumming. [L. S.]
Isaac I. Stevens. [L. S.]

Piegans:
Nee-ti-nee, or "the only chief," now called the Lame Bull, his x mark. [L. S.]
Mountain Chief, his x mark. [L. S.]
Low Horn, his x mark. [L. S.]
Little Gray Head, his x mark. [L. S.]
Little Dog, his x mark. [L. S.]
Big Snake, his x mark. [L. S.]
The Skunk, his x mark. [L. S.]
The Bad Head, his x mark. [L. S.]
Kitch-eepone-istah, his x mark. [L. S.]
Middle Sitter, his x mark. [L. S.]

Bloods:
Onis-tay-say-nah-que-im, his x mark. [L. S.]

Nez Perces:
Spotted Eagle, his x mark. [L. S.]
Looking Glass, his x mark. [L. S.]
The Three Feathers, his x mark. [L. S.]
Eagle from the Light, his x mark. [L. S.]
The Lone Bird, his x mark. [L. S.]
Ip-shun-nee-wus, his x mark. [L. S.]
Jason, his x mark. [L. S.]
Wat-ti-wat-ti-we-hinck, his x mark. [L. S.]
White Bird, his x mark. [L. S.]
Stabbing Man, his x mark. [L. S.]
Jesse, his x mark. [L. S.]
Plenty Bears, his x mark. [L. S.]

Flathead Nation:
Victor, his x mark. [L. S.]

The Father of All Children, his x mark. [L. S.]
The Bull's Back Fat, his x mark. [L. S.]
Heavy Shield, his x mark. [L. S.]
Nah-tose-onistah, his x mark. [L. S.]
The Calf Shirt, his x mark. [L. S.]

Gros Ventres:

Bear's Shirt, his x mark. [L. S.]
Little Soldier, his x mark. [L. S.]
Star Robe, his x mark. [L. S.]
Sitting Squaw, his x mark. [L. S.]
Weasel Horse, his x mark. [L. S.]
The Rider, his x mark. [L. S.]
Eagle Chief, his x mark. [L. S.]
Heap of Bears, his x mark. [L. S.]

Blackfeet:

The Three Bulls, his x mark. [L. S.]
The Old Kootomais, his x mark. [L. S.]
Pow-ah-que, his x mark. [L. S.]
Chief Rabbit Runner, his x mark. [L. S.]
Alexander, his x mark. [L. S.]
Moses, his x mark. [L. S.]
Big Canoe, his x mark. [L. S.]
Ambrose, his x mark. [L. S.]
Kootle-cha, his x mark. [L. S.]
Michelle, his x mark. [L. S.]
Francis, his x mark. [L. S.]
Vincent, his x mark. [L. S.]
Andrew, his x mark. [L. S.]
Adolphe, his mark. [L. S.]
Thunder, his x mark. [L. S.]

Piegans:

Running Rabbit, his x mark. [L. S.]
Chief Bear, his x mark. [L. S.]
The Little White Buffalo, his x mark. [L. S.]
The Big Straw, his x mark. [L. S.]

Flathead:

Bear Track, his x mark. [L. S.]
Little Michelle, his x mark. [L. S.]
Palchinah, his x mark. [L. S.]

Bloods:

The Feather, his x mark. [L. S.]
The White Eagle, his x mark. [L. S.]

APPENDIX H

Treaty With the Crows, 1868.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the

person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefore.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted

to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist mill and single-machine attached, the same to cost not exceeding eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right

to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they man continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause

to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be

induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following article, to wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of

coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the

Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them who shall remove to the reservation herein described, and commence farming, one good American cow and one good, wellbroken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force, or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interest[illegible]n the same, and no cession by the tribe shall be understood or construed in such a manner as to

deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent may grow the most valuable crops for the respective year.

W. T. Sherman,
Lieutenant-General.

Wm. S. Harney,
Brevet Major-General and
Peace Commissioner.

Alfred H. Terry,
Brevet Major-General.

C. C. Augur,
Brevet Major-General.

John B. Sanborn.

S. F. Tappan.

Ashton S. H. White, Secretary.

Che-ra-pee-ssh-ka-te, Pretty Bull, his x mark. [seal]

Chat-sta-he, Wolf Bow, his x mark. [seal]

Ah-be-che-se, Mountain Tail, his x mark. [seal]

Kam-ne-but-sa, Black Foot, his x mark. [seal]

De-sal-ze-cho-se, White Horse, his x mark. [seal]

Chin-ka-she-arache, Poor Elk, his x mark. [seal]

E-sa-woor, Shot in the Jaw, his x mark. [seal]

E-sha-chose, White Forehead, his x mark. [seal]

— — Roo-ka, Pounded Meat, his x mark. [seal]

De-ka-ke-up-se, Bird in the Neck, his x mark. [seal]

Me-na-che, The Swan, his x mark. [seal]

Attest:

George B. Willis, phonographer.

John D. Howland.

Alex. Gardner.

David Knox.

Cl[illegible] Freeman.

Jas. C. O'Connor.

APPENDIX I

Flathead Allotment Act of April 23, 1904, 33 Stat. 302

CHAP. 1495.—An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pen d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the

amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and townsite laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not

occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided,* That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one

dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.[1]

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided,* That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

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[1] 41 L. D., 521.

SEC. 12.[1] That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to

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[1]A substitute for sec. 12 was enacted in sec. 9 of the act of 1905, ch. 1479, 33 Stat., 1080, post, p. 157.

settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated out of any money in the Treasury not otherwise appropriated, the

sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904.

APPENDIX J

House of Representatives
58th Congress, 2nd Session

Report No. 1678

SURVEY, ETC., OF FLATHEAD INDIAN LANDS, MONTANA

March 17, 1904—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. MARSHALL
from the Committee on Indian Affairs,
submitted the following
REPORT
[To accompany H.R. 12231.]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 12231) for the survey and allotment of lands now embraced within the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment, having had the same under considerations, submit the following report and recommend the passage of the bill with the amendments herein set forth.

In line 6, page 3, after the word "by," insert "the smallest."

In line 7, page 3, after the word "subdivisions," insert "of forty acres each."

In line 20, page 3, strike out the word "six" and insert the word "eight."

After the word "employed," in line 20, insert "with such assistance as may be necessary, at a salary not to exceed six dollars per day while so actually employed."

In line 23, page 3, after the word "agent," insert "and inspector."

On page 4, line 17, after the word "occupied," insert "not exceeding two sections in any one township."

On page 6, line 24, after the word "cash," insert "or at public auction, as the Secretary of the Interior may determine."

On page 7, line 13, strike out the word "only."

On page 8, line 6, strike out the words "at public auction."

On page 8, line 16, strike out the words "excepting the" and in lieu thereof insert the word "and."

In line 24 strike out the word "give" and insert the word "aid;" and also strike out the word "a."

In line 25 strike out the word "start;" also the words "the pursuit of;" also the word "or," and insert in lieu thereof "and."

On page 9, line 3, strike out the words "time that this act shall take effect" and insert in lieu thereof the words "date of the proclamation provided for in section nine hereof."

In line 14, after the word "necessary," insert "the same to be reimbursable out of the funds arising from the sale of said lands."

By the treaty with the Flathead Indians, made by Governor Stevens when this reservation was set aside, it was expressly provided:

> ART. 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

The article in the Omaha treaty referred to expressly provides for the sale of all of the surplus lands, paying the proceeds to the Indians.

There are included in this reservation about 1,450,000 acres of land. It is estimated that 100,000 acres will cover the allotments for all Indians on the reservation, leaving 1,350,000 acres for settlement. Some of the most fertile lands in the State of Montana are embraced within this reservation and are now lying idle and unoccupied.

By the terms of the bill all of these lands are to be appraised by a commission of five persons, two of whom shall be members of this tribe, two of whom shall be citizens of the State of Montana, and one a special agent of the Indian Bureau.

All of the proceeds of sales, except the expense of administering this trust, go to the Indians themselves. We believe no fairer plan can be devised to protect every right of the Indians. The United States, under the terms of this bill, acts as trustee only, and assumes no liability. No ap-

propriation is called for, except for the payment of sections 16 and 36 at $1.25 per acre, the same to be ceded to the State of Montana for school purposes, in accordance with the enabling act of Montana, which will require not to exceed $100,000.

The Department of the Interior recommends the passage of the bill.

Appended hereto is a letter from the honorable Secretary of the Interior relative to H.R. 8324, which is substantially the same as the present bill, it having been amended in accordance with the recommendations of the Department.

Department of the Interior
Washington, January 13, 1904

Sir: I am in receipt of your letter of the 13th instant, inclosing H. R. 8324, being a bill "for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and asking for a report on the same.

In reply I would state that it has been the desire of the Department for some time to take steps to allot the Indians of the Flathead Reservation upon tracts of land in severalty, to make provisions for the irrigation of their allotments, where needed, and to place all the Indians on the reservation in a position to improve their condition and support themselves, and with certain amendments which are indicated and set out below, I believe that these

objects can be accomplished by the proposed bill, if enacted into law, viz:

Section 2.—In line 4 of page 2 the words "now holding tribal relations" should be stricken out and the words "having tribal rights" substituted therefor. The language employed in the bill as it now stands is thought to be somewhat ambiguous, and if amended as indicated the rights of any persons as Indians on said reservation if questioned may be determined by the Interior Department in the usual manner.

In line 8 of page 2, after the word "Reservation," insert the words "including the Lower Pend d'Oreille or Calispel Indians now on the reservation." This amendment is deemed to be very necessary in order to fix the status of this band of Indians upon the Flathead Reservation, which is now very doubtful and open to question. In the spring of 1887 the Northwest Commission concluded agreements with the Indians of the Flathead Reservation and the Indians known as the Lower Pend d'Oreille or Calispels residing along the Calispel River in eastern Washington, by the terms of which the latter Indians were to remove to the Flathead Reservation. In anticipation of the ratification of this agreement about one-half of said Calispels under Chief Michael (Michel), removed to the reservation. The other half never removed and are still in the vicinity of their old home in Washington. These two agreements were duly submitted to Congress, but for some reason (unknown to the office) they were never ratified. The necessity for fixing the status of the Calispels now on said Reservation will therefor be apparent.

Section 3.—The Department believes that the work of classifying and appraising the lands of the said reservation can be equally as well accomplished by a commission of three persons as by one consisting of five. It is therefore recommended that in line 12 of page 2, the word "five" be stricken out, and the word "three" substituted therefor, and that lines 16 to 22 be stricken out and the following substituted in lieu thereof: "One of said commissioners so named by the President shall be an Indian having tribal rights on the Flathead Reservation, such commissioner to be designated by the chiefs and headmen of said confederated tribes of Indians; one of said commissioners shall be a resident citizen of the State of Montana; and the third commissioner shall be a United States special Indian agent or Indian inspector of the Interior Department."

Section 4.—In line 3 of page 3, it is recommended that the word "seven" be stricken out and the word "five" substituted therefor, so as to provide for a salary for the clerk to said commission at $5 per day instead of $7. It is believed that $5 per day will be ample to secure the services of a competent clerk to perform the duties required.

Section 5.—In line 5 of page 3, after the word "appraise," it is suggested that the words "by legal subdivisions" should be inserted, and it is so recommended.

Section 6.—The first clause of this section fixes a maximum limit at which said commission may appraise the several classes of land. The department is emphatically of the opinion that no such limit should be fixed, but that the appraisals should be placed at their real evaluation as to each of the different classes of lands. It is there-

fore recommended that lines 13, 14, 15, 16, and 17, and all excepting the word "said," in line 18, be entirely eliminated and stricken out.

It is also believed that the timber lands should have the timber thereon estimated by legal subdivisions instead of 160-acre tracts. It is therefore recommended that in line 21, page 6, the words "legal subdivisions be substituted for the words "subdivisions of one hundred and sixty acres thereof."

Section 7.—In line 5 of page 4 the word "each" should be added after the words "per day" so as to provide for a per diem of $10 for each of the two commissioners, excepting the special agent or inspector. Also in line 7 on page 4 the word "complete" should be "completed."

Section 8.—In line 11 of page 4 the words "such classification and appraisement" should be stricken out and the words "the same" inserted. Also in line 12 of page 4 the word "same" should be stricken out and the word "land" inserted therefor.

In line 22 of page 4 the words "herein ceded" should be stricken out and the words "under consideration" substituted therefor. The Flathead Indians have not agreed to any cession of the lands comprising their reservation and no such cession is contemplated.

The provision in section 8 as to payment by the United States for the State school lands is not perfectly clear and makes no provision as to the price per acre to be paid. It is recommended that in lines 22 and 24 of page 4, and line 1 of page 5, the words "which shall be paid for by the United States as herein provided in a quantity equal

to the loss, and" be eliminated and stricken out, and that the following proviso be added at the end of the section, line 2, page 5, as follows: "Provided, That the United States shall pay to said Indians for the lands in said sections 16 and 36, or the lands selected in lieu thereof, the price per acre at which the same are appraised by the aforesaid commission."

Section 9.—The provision regarding the proclamation of the President opening the surplus lands appears to be somewhat ambiguous as it now stands. It is suggested that after the word "prescribe," in line 5 of page 5, the words "the time when and" be inserted, and that in lines 9, 10, and 11 the phrase "until after the expiration of sixty days from the time when the same are open to settlement and entry" be stricken out.

The Department is of the opinion that the provision in reference to the payments to be made by settlers on said lands should be changed so as to require a larger cash payment at the time of entry. It is therefore recommended that the words "the appraised value thereof in five annual payments annually in advance," lines 21 and 22, page 5, should be stricken out, and the following words substituted therefor: "One-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four and five years, respectively, from and after the date of entry." The words "in advance," in line 24, same page, should be stricken out.

The provision in lines 8, 9, 10, 11, page 6, authorizing the Secretary of the Interior to excuse a settler for failure to make the required payments to defer the same,

should be entirely eliminated. From past experience I am convinced that if the Indians are to receive the full valuation for their lands and to receive it promptly, that no permission should be granted to any settler to defer the time of making payments.

Section 10.—At the end of this section, line 19, page 6, the following provision should be added: "Provided, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian." To permit mineral locations to be made upon the lands allotted to Indians will only invite future trouble for the allottee, and in their behalf and for their protection no such location should be permitted under any circumstances.

Section 11.—This section should be amended by inserting, after the words "Secretary of the Interior," in line 22, page 6, the words "under sealed bids." Full prices for such timber lands and fair competition can best be secured by disposing of the same under sealed bids.

Section 12.—It is recommended that the words "six hundred and forty" should be substituted for the words "three hundred and twenty" in line 25, page 6, and that after the word "Jesus" in line 6, page 7, the words "such lands to be reserved for the uses indicated only so long as the same are maintained and occupied by said society for the purposes indicated" be added.

It is recommended further that the following clause be inserted after the addition last mentioned. "The President is also authorized to reserve lands upon the same conditions and for similar purposes, for any other missionary or religious societies that may make application

therefor within one year after the passage of this act, in such quantity as he may deem proper."

Section 13.—In line 19, page 7, the words "one dollar and twenty-five cents per acre" should be stricken out, and the words "their appraised value" substituted therefor, and it is so recommended.

There can be no justification for selling lands at $1.25 per acre that are appraised at $3 or $4 per acre, or perhaps more. There is no doubt but that lands which remain unentered by homesteaders with the requirement of settlement and residence for five years annexed, might readily sell for their appraised price without such requirements and in tracts of 320 acres. If it should happen that any of the tracts are appraised too high to secure purchasers or entrymen, then provision should be made for a reappraisement. Under no conditions should the price of sale be reduced below the appraised value.

Another point should be noted in this connection, and that is the probability that prospective settlers would be deterred from entering the lands at the appraised value, should they know, as proposed in the bill, that at some future time the lands might be procured at perhaps one-third or one-half the appraised price. A practical illustration of such a condition was afforded in connection with the opening of the Great Sioux Reservation in Dakota, by the act of March 2, 1889 (25 Stat. L., p. 888).

Section 14.—Strike out the whole of section 14 and insert as follows:

"Sec. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid

into the Treasury of the United States, and, after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, excepting the expenses of the survey of the lands, shall be expended or paid annually as they accrue, as follows: One-half shall be expended by the Secretary of the Interior, as he may deem advisable, for the benefit of said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Calispels thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to give the Indians a start in the pursuit of farming or stock raising, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Calispels thereon at the time that this act shall take effect, or expended on their account, as they may elect."

Section 15.—It is recommended that the following be substituted for section 15 of said bill:

"That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be necessary to pay for the lands granted to the State of Montana, and for lands reserved for agency, school, and mission purposes, as provided in sections 8 and 12 of this act, at their appraised valuation; also the sum of seventy-five thousand dollars, or so much thereof, as may be necessary, to enable the Secretary of the Interior to survey the lands of said reservation, as provided in section 1 of this act."

In connection with the aforesaid proposed item for State school lands, the Department has to say that it would be impossible, in advance of the survey and appraisement of said lands, to estimate, even approximately, the value of such school lands. The reservation contains, it is now estimated, about 1,433,000 acres. One eighteenth of this, which is to be donated to the State, would be about 80,000 acres. As it is believed that the average value of those lands will be considerably more than $1 per acre, it will be seen that the proposed appropriation of $90,000, as provided in said bill, would in any event be insufficient.

Section 16.—In line 15, page 9, after the word "township," insert "and the reserved tracts mentioned in section 12."

Section 17.—This section provides for the consent of the Indians to the provisions of the bill before the same shall become effective. The bill if amended as above recommended, will fully safeguard and protect the rights and interests of the Flathead Indians, and there is no occasion for presenting the matter to the Indians for the purpose of procuring their consent thereto. It is accordingly recommended that said section 17 be entirely stricken out.

Very Respectfully,

E. A. Hitchcock, Secretary.

The Chairman of the Committee on Indian Affairs,
House of Representatives.

APPENDIX K

Senate
58th Congress, 2d Session

Report No. 1930

FLATHEAD INDIAN RESERVATION LANDS.

April 7, 1904—Ordered to be printed.

MR. STEWART,
from the Committee on Indian Affairs,
submitted the following
REPORT.
[To accompany H. R. 12231.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 12231) for the survey and allotment of lands embraced within the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment, having had the same under consideration, submit the following report and recommend the passage of the bill without amendment:

By the treaty with the Flathead Indians, made by Governor Stevens when this reservation was set aside, it was expressly provided that the President should cause the lands to be surveyed, the necessary lands alloted to the Indians, and all the surplus lands sold for their benefit. The present bill merely provides the necessary means for carrying the agreement with the Indians into effect.

We believe that the provisions of this bill in creating a commission to be named by the President for the classifying and appraising of these lands, consisting of two In-

dians now holding tribal relations with the said Indians, two citizens of the State in which the lands are situated, and one special agent of the Indian Bureau, is a most just and equitable provision and one that will meet with the approbation of all friends of the Indians in fully protecting their interests.

These Indians now inhabiting said Flathead Reservation are far advanced in civilization and are anxious for the early carrying into effect of the wise and equitable provisions of this act.

It is estimated that less than 100,000 acres of these lands will be more than sufficient to allot all Indians now on the reservation and that about 1,350,000 acres of land will be thrown open for settlement lands.

The bill provides that the commission shall segregate all timber lands, which shall be sold from time to time by the Secretary of the Interior under such regulations as he may prescribe. The agricultural lands are to be opened for homestead settlement only, the settlers paying the appraised price of the lands settled upon.

At the expiration of five years such waste and grazing lands as may then remain unsettled may be sold by the Secretary of the Interior under such regulations as he may prescribe.

The United States Government only acts herein as trustee for the Indians.

We believe this bill to be most meritorious, just, and equitable and recommend its passage without amendment.

The honorable Secretary of the Interior and the honorable Commissioner of Indian Affairs both recommend the passage of the bill.

Attached hereto is the report of the House Committee on Indian Affairs, with the report from the honorable Secretary of the Interior on the original House bill, which was amended in accordance with his recommendations.

(See attached Appendix E for report of the House Committee on Indian Affairs, with attached report from the Honorable Secretary of the Interior, E. A. Hitchcock.)

APPENDIX L

Senate
61st Congress, 2d Session

Report No. 117

SURVEY, ALLOTMENT, ETC., OF LANDS IN FLATHEAD INDIAN RESERVATION, MONT.

January 26, 1910—Ordered to be printed.

MR. DIXON,
from the Committee on Indian Affairs,
submitted the following
REPORT.
[To accompany S. 3983]

The Committee on Indian Affairs, to which was referred Senate bill 3983, entitled "A bill to amend the act of April twenty-third, nineteeen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled 'An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment,' and all amendments thereto," beg leave to report the same back to the Senate with the recommendation that the bill do pass with amendments.

The Flathead Indian Reservation has been surveyed and allotments made to all of the Indians holding tribal relations with the Flathead Indians. The bill in question proposes to survey and sub-divide into small lots for summer-residence sites the entire unallotted lands fronting on Flathead Lake, the proceeds from the sale of these lots

to be used in furthering the reclamation of the allotted Indians' lands which is now being carried on. The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands, opening them to settlement. The bill also provides that, where Indian allotments are irrigated, that the Secretary of the Interior may, upon the application of the Indian allottee, sell a portion of his allotment, retaining in all cases a sufficient amount of land for actual cultivation by the allottee. The bill also provides for an exchange of allotments where the allotments already made fall under the reservoir sites that are needed in the construction of the irrigation projects. Your committee is of the unanimous belief that the proposed legislation is most meritorious and for the benefit of the Flathead Indians.

The bill in question was referred to the Secretary of the Interior for a report, which is attached hereto, marked Exhibit "A," and made a part hereof.

Amend the bill by striking out all of the original bill, except the enacting clause, and inserting in lieu thereof the following:

> That the act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana," and all amendments thereto, be amended by adding thereto the following sections:
>
> "Sec. 23. That the Secretary of the Interior be, and he is hereby, authorized to immediately cause to be surveyed and subdivided into lots, not less than two

acres and not more than five acres in area, all of the unallotted land fronting on Flathead Lake, in the State of Montana, that are embraced within the limits of the Flathead Indian Reservation, whether classified as grazing, agricultural, or timberlands.

"That when said lands are so surveyed and subdivided into lots as aforesaid, the Secretary of the Interior shall sell the same to the highest bidder, either at public sale or under sealed bids, as in his judgment he shall deem best for the interest of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, the proceeds from the sale of said lands, after deducting the expenses of the survey and sale of the lands, shall be paid into the Treasury of the United States and expended as heretofore provided in section fourteen, as amended by the act of May twenty-ninth, nineteen hundred and eight.

"Sec. 24. That where allotments of lands have been made in severalty to said Indians from the lands embraced within the area of said Flathead Indian Reservation, which are or may be irrigable lands, the Secretary of the Interior may, upon application of the Indian allottee, sell and dispose of not to exceed sixty acres of such individual allotment of land, under such terms and conditions of sale as the Secretary of the Interior may prescribe, one-half of the proceeds of the sale of said individual allotment to be paid to the Indian allottee and the remaining half of the proceeds of sale to be held in trust for the said Indian allottee, upon which he shall be paid annually not less than three per centum interest, the remaining principal sum to be paid to said allottee or his heirs when the full period of his trust patent for the remaining lands covered by his allotment shall have expired, or sooner, should the Secretary of the Interior, in his judgment, deem it best for said Indian allottee.

"And in the event of the failure, neglect, or refusal of any such allottee to relinquish any allot-

ment made to him on any land reserved or necessary for reservoir sites, as aforesaid, the Secretary of the Interior is authorized to bring action under the provision of the laws of the State of Montana to condemn and acquire title to any and all lands necessary or useful for said reservoir sites that have heretofore been allotted on said Flathead Indian Reservation lands."

EXHIBIT A

DEPARTMENT OF THE INTERIOR

Washington, January 17, 1910.

Sir: I have the honor to acknowledge the receipt, by your reference, of a copy of Senate bill No. 3983, Sixty-first Congress, second session, amending the act of April 23, 1904 (33 Stat. L., 302), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," and all amendments thereto, by authorizing the sale and disposal of the unallotted lands fronting on Flathead Lake in areas of not less than 2 nor more than 5 acres as summer residence sites to the highest cash bidder, and the sale and disposal of not to exceed 60 acres of any allotment on irrigable lands on application by the Indian allottee.

The department is of the opinion that a larger sum will be procured from the sale of the unallotted lands bordering Flathead Lake in areas of from 2 to 5 acres for summer-residence sites than from their sale as provided in section 8 of the act of April 23, 1904, supra. It is believed, however, that the proceeds derived from the sale of these lands should be subject to the same disposition as is provided for the proceeds derived from other surplus lands by section 14 of the act of April 23, 1901, supra, as amended by the act of May 29, 1908 (35 Stat. L., 444-450).

The two sections numbered 1 and 2 of the bill do not relate to sections 1 and 2 of the act of April 23, 1904, supra, which it is proposed to amend. It is suggested that possible confusion will be obviated by giving the two sections of the bill the next consecutive numbers of the original bill as amended by the act of March 3, 1909 (35 Stat. L., 795-796).

It is respectfully recommended, therefore, that the following changes be made in the bill:

In line 9, page 1, strike out the words "as follows" and insert in lieu thereof the words "by adding thereto the following sections."

Strike out the figure "1" in line 1, section 1, page 2, and insert in lieu thereof the figures "23."

Strike out the figure "2" in line 18, section 2, page 2, and insert in lieu thereof the figures "24."

In section 2, page 2, strike out all that part after the word "lands" in line 14, and insert in lieu thereof the following: ", after deducting the expenses of the survey and sale of the lands, shall be paid into the Treasury of the United States and expended as heretofore provided in section fourteen, as amended by the act of May twenty-ninth, nineteen hundred and eight."

The act of March 3, 1909, supra, authorized the Secretary of the Interior to reserve from location, entry, sale, or other appropriation all lands within the Flathead Reservation chiefly valuable for power or reservoir sites. There are about 144 Indian allotments within the areas withdrawn for power and reservoir sites. The department has been unable to procure the relinquishment of all of these allotments. No authority has been conferred on the department to compel the relinquishment of these allotments and it is not probable that the voluntary relinquishment of all the allottees can be procured before April 1, 1910, the date set by the President's proclamation for

making entry of the surplus lands on this reservation. It is believed that the department should be authorized to reserve a sufficient quantity of the surplus lands to provide lieu allotments for those Indians who may hereafter relinquish their allotments within any of the power or reservior sites referred to, by adding to Senate bill No. 3983, Sixty-first Congress, second session, the following:

"Section 25. That the Secretary of the Interior is hereby authorized to set aside and reserve so much of the surplus unallotted and otherwise unreserved lands of the Flathead Indian Reservation as may be necessary to provide an allotment to each Indian having an allotment on any of the lands set aside and reserved for power or reservoir sites, as authorized by section twenty-two of the act of March third, nineteen hundred and nine (Thirty-fifth Statutes at Large, page seven hundred and ninety-six), who may relinquish his allotment within such power or reservoir site; and the"

The department will be glad to see the amendments suggested herein become a part of the law.

Very Respectfully,

R. A. BALLINGER, *Secretary.*

Hon. Moses E. Clapp,

Chairman Committee on Indian Affairs,
United States Senate.

APPENDIX M

Regulations for the Sale of the Villa-Site Lots Around Flathead Lake in the Former Flathead Indian Reservation, Mont.

Department of the Interior

Washington, March 20, 1915

The Commissioner of the General Land Office.

Sir: Under the provisions of the act of April 12, 1910 (36 Stat., 296), you are directed to cause the lots surveyed as villa sites around Flathead Lake, in the former Flathead Indian Reservation, Mont., to be offered for sale at Polson, Mont., at public outcry, under the supervision of the superintendent of opening and sale of Indian lands, at not less than $10 per acre, beginning on July 26, 1915, and continuing thereafter from day to day as long as may be necessary, Sundays and holidays excepted, in the manner and under the terms herein after prescribed.

Manner—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots are offered for sale hereunder, and any person may purchase any number of lots for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot awarded to him shall be reoffered for sale on the following day.

Terms—Payments will be required as follows: No lot will be disposed of for less than $10 per acre, and at

least 25 per cent of the bid price of each lot sold must be paid on the date of the sale and the remainder, if the price bid is $50 or less, within one year from the date of sale; if the price bid be over $50 and less than $100, 75 per cent of the cost may be divided into two equal payments, due, respectively, one and two years from the date of the sale; if the price bid be $100 or more, the 75 per cent remaining unpaid may be divided into three equal payments, due, respectively, one, two, and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a non-transferrable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made. All lots affected by the easement provided for in the act of April 24, 1912 (37 Stat. 527), as shown upon the approved plats of said lots, will be sold subject to said easement.

Forfeiture—If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited, and the lot, after forfeiture is declared, will be subject to disposition as provided in said act. Lots remaining unsold at the close

of sale, or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale, will be subject to future disposition at public sale at such time and place as may thereafter be provided. All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously, or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 2373 of the Revised Statutes of the United States, which reads as follows:

> "Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree, with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation or unfair management hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars or imprisoned not more than two years, or both."

The superintendent of the opening and sale of Indian lands will be, and he is hereby, authorized in his discretion to fix for any lot a greater minimum price per acre than $10, and he may reject any and all bids for any lot, and at any time suspend, adjourn, or postpone the sale of any lot or lots tc such time and place as he may deem proper.

Very respectfully,

A. A. Jones,

First Assistant Secretary.

FLATHEAD LAKE, MONTANA,

Is situated near to and slightly southwest of the Glacier National Park, the region of eternal ice, which may be reached by automobile from the lake in about three hours. The lake is in a valley 15 miles wide and 30 miles long, between ranges of the Rocky Mountains of scenic beauty, whose slopes are covered with fir, larch, and pine trees. The lake has an area of approximately 360 square miles. The Flathead National Forest lies north, west, and east of the valley. The lake and streams abound in fish, and hunting is excellent. The lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves.

The lands abutting the north half of the lake were disposed of many years ago, and numerous homes and fruit orchards have been established thereon. The south half of the lake is within the former Flathead Indian Reservation. The climate is delightful, the thermometer ranging from about zero to 75° or 80° above. Apples, pears, cherries, peaches, and small fruits of the finest quality are raised upon lands bordering upon the lake, many without irrigation.

Twenty-one groups of villa sites fronting on said lake have been surveyed into 905 lots or villa sites for disposition, and a sale of such portion thereof as the demand may warrant will take place in accordance with the regulations hereto attached. The lots contain not less than two or more than five acres.

These villa sites are not only well adapted for summer villas for persons of wealth but for permanent homes for persons of moderate means and for fruit raising. Good roads, adapted to automobile use, skirt the shores of the lake.

The location of the groups of villa sites is shown upon the above plat, and the name of each group and the number of villa sites are as follows:

Name	*Lots*	*Name*	*Lots*
Alson	14	Larches	18
Armo	11	Matterhorn	54
Baptiste	20	Narrows	5
Big Arm	64	Orchard	44
Blue Grade	40	Pollard	24
Cromwell	31	Safety Bay	181
Daycrom	43	Station	10
Featou	79	White Swan	61
Finley Point	32	Wild Horse	29
Grouse	93	Wilgus	17
Island	3		

The sale will begin at Polson on July 26, 1915, and continue at such other places as may be selected by the superintendent of sale. Polson may be reached from Kalispell either from east or west by lake shore. Automobile stages run daily from Polson on the lake to Ravalli, on the Northern Pacific Railway, and from Elmo, on the lake, to Plains, on said railway, via Camas Hot Springs. Trains from Kalispell, on the Great Northern Railway, connect at Somers for the morning trips of the steamers over the lake to Polson, and from Somers to Big Arm by way of Dayton, Elmo, and many other wharf landings on the western shore. Stop-over privileges can be obtained

at Missoula, on the Chicago, Milwaukee & St. Paul Railway, and the lake be reached by automobile stage. The Canadian Pacific Railway will also allow stop-over privileges at Elko, Fernie, or Michel, British Columbia, on tourist tickets, from which points connections can be made with the Great Northern Railway to Somers, on the lake.

Plats of the 21 villa sites will be on file in the following United States land offices: Billings, Bozeman, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Miles City, and Missoula, Mont.; Denver, Colo.; Cheyenne, Wyo.; Bismarck, N. Dak.; Pierre, S. Dak.; Sante Fe, N. Mex.; Phoenix, Ariz.; Salt Lake City, Utah; Carson City, Nev.; Spokane and Seattle, Wash.; Portland, Oreg.; and Los Angeles and San Francisco, Cal. A set of the plats will also be on file with the United States Reclamation Service, room 802 Post Office Building, Chicago, Ill. These plats will be subject to inspection without charge.

Through the courtesy of the Post Office Department, complete sets of the above plats of villa sites may be examined in the post offices at New York, Philadelphia, Boston, Pittsburgh, Atlanta, and New Orleans.

APPENDIX N

Ordinance of the Governing Body of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation

Shoreline Protection Ordinance

Be it enacted by the Council of the Confederated Salish and Kootenai Tribes that:

Section 1. The Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, finds and declares that—

(a) title to the bed and banks below high water mark of all navigable waters on the Flathead Indian Reservation is held by the United States in trust for the Confederated Salish and Kootenai Tribes, and such waters and their shorelines are among the most valuable and fragile of the natural resources of the Reservation and are high in scenic and resource value;

(b) increasing population and ever greater utilization of, unrestricted construction on and other activities along these shorelines are causing much of the value of the shorelines to become permanently lost and the shorelines to become permanently and irreparably despoiled, and there therefore exists an immediate need to regulate such activities and manage the shorelines so as to preserve and protect them and, to the greatest extent possible, restore them to their original condition; and

(c) under the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes

hold the exclusive right to fish in the waters within the Reservation, and the aforementioned activities along the shorelines of such waters are causing significant harm to the ecology of the waters and are destroying the shores as a habitat for plants, fish and other animal life and thereby are interfering with the Tribes' fishing rights, and for this reason also there exists an immediate need to regulate such activities and manage the shorelines so as to protect and preserve the plant, fish and other animal life in said waters and the general ecology of the shorelines.

(d) that the power to promulgate these regulations is based on the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Article VI, Sections 1 (a), 1 (l) and 1 (n).

Definitions

Section 2. For the purposes of this Ordinance, the term—

(a) "Tribes" means the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana;

(b) "Tribal Council" means the governing body of the Tribes, or its designee;

(c) "Reservation" means the Flathead Reservation, Montana;

(d) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, local governmental unit however designated, agency of the State of Montana or of any other state, or any other legal entity, but does not include the Tribes or any person acting as the Tribes' agent;

(e) "Navigable water" or "navigable waters" means the south part of Flathead Lake, being the portion of the Lake located within the outer boundaries of the Reservation, the portion of Flathead River located within the outer boundaries of the Reservation, and any other lakes, reservoirs, ponds, rivers, streams and bodies of water which are navigable in fact and are located within the outer boundaries of the Reservation, and

(f) "High water mark" means, on Flathead Lake, elevation 2893.2 feet, and, on any other navigable water, means that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on the effective date of this Ordinance or as it may naturally change thereafter, or, where such mark cannot be found, the line of mean high water.

Landfills and Dredging

Section 3. (a) It shall be unlawful, after the effective date of this Ordinance, for any person—

(1) to make or cause to be made, on the bed or banks of any navigable waters below high water mark, any fill or deposit of rock, earth, sand, soil, gravel, shells or other materials, or refuse matter of any kind or description, whether for the purpose of constructing a landfill or other structure (other than a structure referred to in section 4 of this Ordinance), or otherwise; and

(2) to dredge, or otherwise remove or displace by any means any soil, sand, gravel, shells or other

material, whether or not of intrinsic value, from the bed or banks of any navigable water below high water mark.

(b) Any fill or deposit of the type referred to in subsection (a) (1) of this section which was made prior to and is in existence on the effective date of this Ordinance is hereby declared to be unlawful, and, not later than six months following the effective date of this Ordinance, the person who made such fill or deposit or caused such fill or deposit to be made, or the successor in interest of the property, riparian to the navigable water, to which such fill or deposit abuts, or the person maintaining such fill or deposit on the effective date of this Ordinance, or any or all of them, shall remove such fill or deposit and return the land underlying such fill or deposit to its original condition: *Provided*, that, upon application submitted to the Tribal Council by any such person, the Tribal Council may grant a variance with respect to any such fill or deposit, exempting the fill or deposit from the application of this subsection (b), if it determines that the removal of the fill or deposit would be more harmful to the environment than leaving the fill or deposit in place: *Provided further*, that the granting of any such variance shall not prevent the Tribal Council from terminating the same at a later time upon reaching a different determination and requiring the person to comply with the provisions of this subsection (b) within three months after receiving notification of such termination from the Tribal Council.

New Wharves, Docks, Breakwaters, Etc.

Section 4. (a) It shall be unlawful, after the effective date of this Ordinance, for any person who has not

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first obtained a permit from the Tribal Council, pursuant to section 4 (b) of this Ordinance, to construct or cause to be constructed, on the bed or banks of any navigable waters below high water mark, any wharf, dock, pier, breakwater, jetty, groin, bulkhead, marina or other structure, or any addition or improvement to any such structure.

(b) A permit, as required by section 4 (a) of this Ordinance, may be granted upon application to the Tribal Council. The application shall describe in reasonable detail the nature of the structure to which the permit is to relate, including its location, size, shape, building materials to be used, use for which intended, and any other plans and information which the Tribal Council deems relevant. The Tribal Council shall determine, in its sole discretion, whether and subject to what conditions, if any, to issue the permit: *Provided*, That, in reaching its decision, the Tribal Council shall be governed by the following rules and principles:

(1) The Tribal Council, before granting a permit, shall ascertain the probable effect of the structure, or addition or improvement thereto, on the water quality, continued use of the affected area as a habitat for fish and wildlife, navigation, exercise of tribal treaty fishing rights, and scenic beauty of the affected area, or on any other resource value. It shall review plans and, as a condition to the issuance of the permit, may prescribe such conditions and limitations as appear necessary to avoid or minimize any such effects of an adverse nature, or, if such adverse effects cannot be avoided or sufficiently minimized, may refuse to issue such permit.

(2) A permit issued under this section shall specify the term for which it is issued, which shall not exceed 5 years, although the Tribal Council may issue a new permit upon expiration of a prior permit, either upon the same or new terms and conditions depending upon developments occurring since the issuance of the expired permit. A permit which does not specify the term or duration for which it is being issued shall be revokable by the Tribal Council any time after one year following its issuance. Any permit issued under this section may be revoked by the Tribal Council at any time for failure to comply with any applicable provision of this Ordinance or the permit.

(3) Not later than 60 days following the expiration or revocation of a permit issued pursuant to this section, the holder of the permit, if no new permit has been issued by that time, shall remove the structure for which the permit was issued and restore the land underlying such structure to its original condition.

(4) Applications for permits pursuant to this section shall be accompanied by a non-refundable fee the amount of which shall be set from time to time by the Tribal Council and which shall be reasonable.

(5) The Tribal Council, as a condition to the issuance and continued effectiveness of permits issued hereunder, may require the payment to the Tribes of a reasonable annual charge or rental fee for the use of Tribal land by any structure constructed or maintained pursuant to this section. The annual charges or fees set by the Tribal Council may vary based on the type of structure involved and, as to any type of structure, may vary based on the size thereof.

Existing Wharves, Docks, Breakwaters, Etc.

Section 5. (a) It shall be unlawful for any person who, on the effective date of this Ordinance, maintains or causes to be maintained, on the bed and banks of any navigable waters below high water mark, any wharf, dock, pier, breakwater, jetty, groin, bulkhead, marina or other structure, to continue to maintain or cause to be maintained such structure without obtaining from the Tribal Council, pursuant to section 5 (b) of this Ordinance, a permit authorizing such continued maintenance.

(b) An application for a permit required by section 5 (a) of this Ordinance must be submitted to the Tribal Council not later than 6 months following the effective date of this Ordinance. The application shall describe in reasonable detail the nature of the structure to which the permit relates, including its location, size, shape, building materials of which constructed, purpose for which used, and any other information which the Tribal Council deems relevant. The Tribal Council shall determine, in its sole discretion, whether and subject to what conditions, if any, to issue the permit: *Provided,* That in reaching its decision, the Tribal Council shall be governed by the following rules and principles:

(1) The Tribal Council, before granting a permit, shall consider and evaluate the quality of construction of the structure and its general state of repair or disrepair, and the probable continuing effect of the structure on the water quality, use of the affected area as a habitat for fish and wildlife, the exercise of tribal treaty fishing rights, navigation, and scenic beauty of the affected area or on any other re-

source value. It shall issue a permit for any such structure intended for use in aid of navigation on the body of water if such structure is no more extensive than necessary for such purpose, does not interfere with navigation on the body of water, is structurally in good condition, does not affect adversely the quality of the water and does not affect adversely tribal treaty fishing rights. As a condition for issuance of a permit for any structure for use in aid of navigation which does not meet such criteria, the Tribal Council may prescribe such conditions, or limitations, including the alteration of the structure, as appear necessary to comply with such criteria and, upon such compliance, the Tribal Council shall issue a permit for such structure. As a condition for issuance of a permit under this section for any other structure, the Tribal Council may prescribe such conditions and limitations as appear necessary to avoid or minimize any of the adverse effects or conditions described in this paragraph or, if such effects cannot be avoided or sufficiently minimized, may refuse to issue such permit.

(2) A permit issued pursuant to this section shall continue in effect until voluntarily surrendered by the holder thereof or until revoked by the Tribal Council due to the violation of any applicable provision of this Ordinance, or the permit, whichever occurs first.

(3) No fee shall be required to accompany applications submitted pursuant to this section.

(4) The Tribal Council, as a condition to the issuance and continued effectiveness of permits issued

under this section, may require the payment to the Tribes of a reasonable annual charge or rental fee for the use of Tribal land by any structure which is not intended for use in aid of navigation or, if intended for such use, by the portion of such structure which exceeds the minimum size necessary for such purpose. The annual charges or fees set by the Tribal Council may vary based on the type of structure involved and, as to any type of structure, may vary based on the size of such structure or portion thereof to which the fee relates.

(5) Not later than 60 days after (i) the surrender or revocation of a permit issued under this section, (ii) the date on which an applicant for a permit is notified that the application has been denied, or (iii) if no application is submitted, the deadline for submitting applications provided in section 5 (b) of this Ordinance, as the case may be, the holder of or applicant for the permit shall remove the structure to which the permit or application related and restore the land underlying such structure to its original condition.

Abandoned Structures

Section 6. Notwithstanding any other provision of this Ordinance, whenever any structure of the type referred to in this Ordinance and located on the bed or banks of any navigable waters below high water mark is abandoned, such structure, whether or not a valid permit exists therefor, shall be removed by the owner thereof and the land underlying such structure restored to its original condition within 60 days of such abandonment.

Inspection and Repair of Structures

Section 7. The Tribal Council shall have the right to inspect from time to time any structure located on navigable waters below high water mark for the purpose of determining the condition of the structure, including its general state of repair or disrepair and its structural strength, and may order the owner of such structure to undertake such repairs of the structure or to build such reinforcements thereto as the Tribal Council deems necessary to eliminate any resulting danger to the health and welfare of the public or to the environment. Failure to comply with any such order shall be grounds for revoking any existing permit in effect for such structure.

Shoreline Protection Board

Section 8. (a) There is hereby established a Shoreline Protection Board, to be composed of seven members no more than four of whom at any one time may be enrolled members of the Tribes. The members of the Board shall be appointed by the Tribal Council, each to hold office for a term of one year and until his successor is appointed. Any vacancy on the Board shall be filled by the Tribal Council for the unexpired portion of the term. Members of the Board shall not be personally liable for damages for actions performed within the actual or apparent scope of the authority described herein.

(b) Except as otherwise provided in this section 8, the Shoreline Protection Board shall be charged with carrying out all of the functions of the Tribal Council under this Ordinance, including, but not limited to, the issuance or denial of permits or variances, the issuance of

orders, the levying of penalties and the making of any and all decisions and determinations necessary in connection therewith.

(c) The actions and decisions of the Shoreline Protection Board shall be final, unless either the person or persons aggrieved thereby, or at least two members of the Board, petition the Tribal Council for review of the action or decision of the Board within five days of the Board's action. The Tribal Council shall take action on the petition within fourteen days, either affirming, modifying or reversing the action of the Board, after full, open hearing. Failure of the Tribal Council to take action within the time prescribed shall be deemed to constitute its affirmance of the Board's action or decision. The Tribal Council's decision under this subsection shall be final action under this Ordinance as to any petition filed by an aggrieved person or aggrieved persons unless such person or persons appeal the decision as provided in section 10 of this Ordinance, and shall constitute final action under this Ordinance as to any petition filed by members of the Board.

Jurisdiction

Section 9. The Tribal Court of the Tribes shall have jurisdiction of all violations of this Ordinance or of permits issued pursuant to this Ordinance and to hear any appeal resulting from actions taken pursuant to this Ordinance.

Appeals

Section 10. Any person or persons aggrieved by a decision of the Tribal Council may appeal such decision to

the Tribal Court within thirty (30) days of the final Council decision, by filing a notice of appeal with the Council or the Council Chairman, and by filing a complaint in the Tribal Court. Upon receipt of the notice of appeal, the Secretary of the Council shall cause all records of said application, including the Council's findings of fact and decision, to be filed with the Tribal Court. On and after the filing of a complaint said action shall be prosecuted, defended and treated as any civil action instituted in said Court. In the trial of such a case it shall be presumed, prima facie, that the final action of the Tribal Council, from which the appeal is taken, is legal in each and every respect. Members of the Council shall not be personally liable for damages for actions performed within the actual or apparent scope of their authority described herein.

The decision of the Tribal Court shall be final.

Penalties

Section 11. Any person or persons whether as principal, agent, employee, or otherwise, who shall make or cause a landfill to be made, dredge, or construct any structure contrary to the provisions of this Ordinance, or who shall commence to fill, dredge, or construct any structure for which a permit is required, without obtaining a permit therefor from the Tribal Council, and any person or persons whether as principal, agent, employee or otherwise, who shall use any landfill, material from dredging, or structure contrary to the provisions of this Ordinance shall be subject to a penalty not to exceed twenty-five dollars ($25.00). Each day during which such violation shall con-

tinue shall be deemed to be a separate infraction of this Ordinance.

Enforcement

Section 12. In case any landfill or dredging is undertaken, or existing landfill or dredging operation is in violation of this Ordinance, or any structure is erected, constructed or used within the outer confines of the Flathead Reservation in violation of any provision of this Ordinance, the Confederated Salish and Kootenai Tribes, in addition to other remedies provided by law, may institute injunctive, abatement or any other appropriate actions or proceedings to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance, or use.

Amendments

Section 13. Any amendments to this Ordinance must be approved by the Commissioner of Indian Affairs.

Severability

Section 14. If any provision of this Ordinance or the applicability thereof is held invalid by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

Effective Date

Section 15. This Ordinance shall become effective on the first day of the month next succeeding the month during which the Ordinance is approved by the United States Secretary of the Interior.

Approved by Secretary of the Interior: July 18, 1977.

Enacted by Tribal Council: July 19, 1977.

Amended by Tribal Council: October 26, 1977.

Amendment approved by Secretary of the Interior: December 13, 1977.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. 2343

THE CONFEDERATED SALISH and
KOOTENAI TRIBES, et al.,

Plaintiffs,

v.

JAMES M. NAMEN, et al., and CITY OF POLSON,
a Montana municipal corporation, Intervenor,

Defendants.

Stipulation

(Filed November 1, 1974)

IT IS HEREBY STIPULATED AND AGREED that Defendants and other riparian owners have expended large sums of moneys for the erection of docks and wharfs abutting their lands on the south half of Flathead Lake.

IT IS HEREBY STIPULATED AND AGREED that the above-entitled action is the first instance in which the Plaintiffs have judicially alleged exclusive rights to the bed and banks of Flathead Lake below highwater mark as

that alleged right relates to the erection of docks and wharfs.

RICHARD A. BAENEN

By /s/ Richard A. Baenen by VFV
Attorney for the Plaintiff

CHRISTIAN, McCURDY,
INGRAHAM & WOLD

By /s/ F. L. Ingraham
Attorneys for the Intervenor

POORE, McKENZIE, ROTH,
ROBISCHON & ROBINSON

By /s/ Urban L. Roth
Attorneys for the Defendants

ORDER

IT IS ORDERED that the facts above stipulated to are hereby made a part of the record in the above-entitled case.

DATED this 1st day of November, 1974.

/s/ William J. Jamesen
District Judge

APPENDIX P

Patent Issued to Antoine Morais

Transcribed from Flathead County Records,
Book 116 Deeds, page 607

29484-10; 24859-10 1.0; 1378.

THE UNITED STATES OF AMERICA.
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that a fee simple patent issue to Antoine Morais a Flathead Indian, for the Lot one and the east half of the Lot two of Section three in Township twenty-two North of Range Twenty West of the Montana Meridian, Montana, containing thirty-five and forty-two hundredths acres.

NOW KNOW YE, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Antoine Morais and to his heirs, the lands above described; To have and to hold the same, together with all rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine Morais and to his heirs and assigns, forever. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the seventeenth day of May in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

By the President: Wm. H. Taft
By M. P. LeRoy, Secretary
H. W. Sanford, Recorder of the
General Land Office.

Recorded: Patent Number 130370
Re-recorded December 23-1912, Book 115-page 530

Recorded at request of F. L. Gray this 29th day of March 1911 at 12-15 o'clock p.m.

Fred S. Perry, County Recorder.
By J. R. Sauser, Deputy. No. 1123-

Transcribed from Flathead County Records,
Book 118 Deeds, page 830

29484-10; 24639-10 1.0; 1378

THE UNITED STATES OF AMERICA.
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that a fee simple patent issue to Antoine Morais a Flathead Indian, for the Lot one and the east half of the Lot two of Section three in Township twenty-two North of Range Twenty West of the Montana Meridian, Montana, containing thirty-five and forty-two hundredths acres.

NOW KNOW YE, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Antoine Morais and to his heirs, the lands above described; To have and to hold the same, together with all rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine Morais and to his heirs and assigns, forever. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the seventeenth day of May in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

By the President: Wm. H. Taft
By M. P. LeRoy, Secretary
H. W. Sanford, Recorder of the
General Land Office.

(United States Land Office Seal)

Recorded: Patent Number 130370

Recorded at request of F. L. Gray this 23rd day of Dec. 1912 at 10:00 o'clock A.M.

Fred S. Perry, County Recorder. No. 4697
(Re-recorded on account of error in former deed, U. S. Land Office Seal omitted. See book 116, page 607 for former deed.)

Office - Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. NAMEN, *et al.*,
Petitioners,

v.

CONFEDERATED SALISH and KOOTENAI TRIBES of the FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the relevant historical facts relating to the negotiation and implementation of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, support the decision of the court below that the bed and banks of the south half of Flathead Lake are held by the United States in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

II. Whether the Confederated Tribes may reasonably regulate the exercise of federal common law riparian rights of non-Indian landowners on tribal trust land forming the bed and banks of the south half of Flathead Lake, through an ordinance that has been expressly approved by the federal government in its exercise of ultimate control over these Tribes and over all navigable waters of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-22

JAMES M. NAMEN, *et al.*,
Petitioners,

v.

CONFEDERATED SALISH and KOOTENAI TRIBES of the FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

ADDITIONAL STATUTES INVOLVED

Act of March 3, 1891, 26 Stat. 1091; Act of March 3, 1909, 35 Stat. 781; Act of March 3, 1911, 36 Stat. 1058; Act of August 24, 1912, 37 Stat. 518; Act of March 7, 1928, 45 Stat. 200; Act of March 4, 1929, 45 Stat. 1623.

STATEMENT OF THE CASE

The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes"), initiated this litigation in 1973, when James M. Namen and members of his family, without permission from any authority, dumped an estimated 174,000 cubic feet of rock and dirt into Flathead Lake.[1] The Tribes sued to protect valuable

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[1] The landfill extends 340 feet into the Lake and then runs parallel to the shoreline for approximately 200 feet, for a total of

tribal property rights which have existed now for over 125 years, which have always been recognized to exist,[2]

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540 feet, and is approximately 40 feet wide at the bottom, 10-15 feet deep, and 10 feet wide at the top. *See Confederated Salish and Kootenai Tribes v. Namen*, Mem. Op. (Petitioners' Appendix, at 87, 138, 155) (hereafter referred to as "App. ——"). The estimate was calculated as follows: 540 (length) x 10 (depth) x 30 (derived from 40-foot width at base to 10-foot width at top) = 174,000.

Petitioners imply that conduct such as that of the Namens, over which the Tribes sued, has been comprehensively regulated, citing the State's "Shoreline Protection Act, 75-7-201 *et seq.*, M.C.A. 1981" (Petition, at 4, n.2). The Namens, however, made their landfill in 1973, and the State enacted its act in 1975, two years after the Tribes challenged such activity. Prior to the 1975 act, the State regulated the construction of wharves and docks on "lands under water belonging to the state" and such structures "shall be public wharves and docks." *See* 85-16-101, *et seq.*, M.C.A. 1979 (cited by the district court. App. at 84-85.).

[2] *See, e.g.*, Senate Doc. No. 153, 71st Cong., 2d Sess. (1930):

> Flathead Power Development. The Flathead River power sites, five in number, and all within the Flathead Reservation, are among the most important undeveloped power sites in the United States. This is because of (1) the existence of Flathead Lake, a very large natural reservoir . . . .
>
> The south half of the Lake is in the Indian Reservation . . . . (*Id.* at 2).
>
> * * *
>
> In the case of a power development upon Indian lands, the title to the site also remains vested in the United States Government but in trust for the Indian tribe, and the site is rented for the 50-year period of the license to the licensee . . . . (*Id.* at 6).
>
> In other words, the Indians have the ownership of the five sites and of that portion of the Flathead Lake that lies within the reservation . . . (*id.* at 33).

The Tribes currently receive $2.6 million annually for one of their power sites, licensed to Montana Power Company, pursuant to a 1978 order of the Federal Energy Regulatory Commission. Prior to this latest increase, they received $950,000 a year. (*See* App. at 24, n.26).

and which, when questioned, have been reconfirmed in the Tribes.[3]

The district court held, *inter alia*, and the court of appeals agreed, that all lands within the original boundaries of the Flathead Indian Reservation are still part of the Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452, 464 (D. Mont. 1974), App. at 178, *aff'd*, 534 F.2d 1376 (9th Cir.), App. at 202-05, *cert. denied*, 429 U.S. 929 (1976) (*"Namen I"*).

In 1975, the City of Polson, Montana, sued the Tribes, seeking a declaratory judgment that the Flathead Reservation had been disestablished, or terminated, by the Flathead Allotment Act, Act of April 23, 1904, ch. 1495, 33 Stat. 302, and that the Tribes no longer had any jurisdiction within the city limits. App. at 236-43. The State of Montana intervened as a plaintiff in that case. In 1977, the United States filed a separate suit, as the Tribes' trustee, against the City of Polson and the State of Montana, asking for a declaratory judgment that the Flathead Reservation had not been disestablished or diminished by the 1904 Act and that the Tribes do have authority to enact and enforce reasonable regulations concerning the use of the bed and banks of the south half of Flathead Lake. Both of those cases were consolidated with the original *Namen* case.

Ultimately, the district court (i) reaffirmed its conclusions in *Namen I* that the United States holds the bed and banks of the south half of Flathead Lake, to the high-water mark, in trust for the Tribes and that the Namens and the City of Polson, through the fee patents issued them or their predecessors, have the customary riparian

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[3] Forty years ago the Court of Appeals for the Ninth Circuit held that the bed and banks of the south half of Flathead Lake were held by the United States for the Tribes, finding that the necessary facts existed to rebut an "equal footing" argument. *Montana Power Co. v. Rochester*, 127 F.2d 189 (1942) (App. at 156 *et seq.*).

rights of access and wharfage, under federal common law, and (ii) held that the Flathead Reservation has neither been diminished nor disestablished. The court accordingly granted the Tribes and the United States summary judgment on the issues of the disestablishment of the Reservation and the ownership of the lakebed. It ruled, however, that the Tribes have no authority to regulate the riparian rights of non-Indians who own land riparian to the south half of Flathead Lake.

The Namens, the State and Polson all appealed to the United States Court of Appeals for the Ninth Circuit on the "disestablishment" and "ownership" issues. The Tribes appealed from the district court's ruling on the "regulatory" issue. On January 23, 1982, the court of appeals ruled: (i) that the Flathead Reservation has not been terminated, disestablished or diminished; (ii) that the United States holds title to the bed and banks of the south half of Flathead Lake, to the high-water mark, in trust for the Tribes; and (iii) that the Tribes have the authority to regulate, in a reasonable manner, the exercise of federal common law riparian rights by non-Indian owners of land littoral to the south half of Flathead Lake.

The Namens and the State now ask this Court to issue a writ of certiorari to review the decisions of the court of appeals on the "ownership" and "regulatory" issues.[4]

STATEMENT OF THE FACTS

1. The Treaty of Hell Gate

By the Treaty of Hell Gate, July 16, 1855,[5] the United States, represented by Governor Isaac Stevens, prevailed

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[4] The City of Polson also seeks review of these issues, but relies on the Namen petition to support its request (Polson Petition, No. 81-2406, at ii). The Tribes therefore respond only to the Namen petition on these issues.

[5] The Treaty was negotiated pursuant to the Act of March 3, 1853, 10 Stat. 226, 238-39, which authorized the President to

upon the predecessors to the Tribes to relinquish their aboriginal territories in exchange for what is now known as the Flathead Reservation.[6]

The minutes of the treaty council make clear that neither the Flathead, Kootenai, Upper Pend Oreille nor Lower Pend Oreille Indians wanted either (i) to relinquish any of their respective territories, (ii) to move from their respective territories, or (iii) to share a reservation with each other. The United States, however, wanted desperately to achieve those results in order to open the Tribes' lands to non-Indian settlement; and, by sophistry, cajolery, ridicule, promises, gifts, and an inexorably superior negotiating position, it was able to achieve its goals.[7] Article II of the Treaty specifically included within the Reservation the south half of Flathead Lake.[8]

---

commence immediately negotiations "with Indian tribes west of Missouri and Iowa for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands. . . ."

[6] Governor Stevens' son Hazard was at the Hell Gate Treaty Council. He later wrote a biography of his father. An accompanying map, at pages 14-15 of Vol. II, sketches generally the territory of the Kootenai, Upper Pend Oreille, Lower Pend Oreille and the Flathead, and shows the Flathead Reservation, as provided for by the Treaty. It includes the south half of Flathead Lake. A copy of that map is reprinted as Appendix A to this brief.

[7] *See* Official Proceedings at the Council held by Governor Isaac Stevens, Supt. of Indian Affairs with the Flathead, Pend Oreille and Kootenai Tribes, at Hell Gate—Records of the Bureau of Indian Affairs, Treaty File Letters Received, 1855, Washington, W601 (Enclosure) National Archives and Records Service.

[8] "To a point due west from the point halfway in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course. . . ." 12 Stat. 975, 976. Flathead Lake is approximately 26 miles long and 5 miles across at its widest. Therefore, something in the neighborhood of 65 square miles of lake area was included within the Reservation by the Treaty.

The Senate ratified the Treaty in 1859. *See* 12 Stat. 975.[9] The north boundary of the Reservation was surveyed in 1887 by United States Deputy Surveyor Harrison. Harrison located this boundary by determining "the north-south midpoint of Flathead Lake, and the boundary line was extended from this point to the east and to the west." [10]

2. Congressional Action Relating to the South Half of Flathead Lake

Two years after Montana was admitted to the Union,[11] Congress referred specifically to the Lake in the Act of March 3, 1891, 26 Stat. 1091, whereby Congress granted a railroad right-of-way through the Reservation, on terms agreed to by the Tribes and Secretary of the Interior.

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[9] By the Act of June 5, 1872, 17 Stat. 226, Congress relocated the Flathead Tribes from the Bitterroot Valley to the present day Reservation.

[10] *Confederated Salish and Kootenai Tribes v. United States*, 173 Ct. Cl. 398, 400 (1965).

[11] The Montana Territory was established by the Act of May 26, 1864, 13 Stat. 85. The Act provided, that "nothing in this act . . . shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States . . . respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise. . . ." *Id.* at 86.

Montana was admitted to the Union pursuant to the Act of February 22, 1887, 25 Stat. 676. That Act contained language similar to the Territorial Act, providing that Indian treaty lands would not be part of the State's territory, absent consent of the Indians. 25 Stat. 677.

The Act provided that "when said railroad shall have been constructed to the south end of said Flathead Lake said company may establish a temporary terminal on the shore of said lake . . . and pending completion of said railroad, may utilize the waters of said Flathead Lake for transportation purposes." [12]

In 1896, Congress appointed a Commission to seek a cessation of a portion of the Flathead Reservation.[13] The Commission was unsuccessful, and the United States subsequently abandoned its effort to seek a cessation of the Reservation.[14] Instead, by the Act of April 23, 1904, 33 Stat. 302, it simply opened the Reservation to non-Indian settlement.

The 1904 Act was amended several times.[15] Three of the amendments related specifically to the south half of

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[12] The Tribes suggest that this Act shows that Congress considered the south half of the Lake to be held in trust for the Tribes, pursuant to the Hell Gate Treaty, and that neither bed nor banks went to the State on its admission to the Union. Congress was then well aware of the equal footing doctrine, which was the subject of this Court's opinions in *Martin v. Wadell*, 41 U.S. 367 (1841), and *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). For example, in 1850, prior to the Treaty of Hell Gate, Congress admitted California to the Union "on an equal footing with the original States in all respects." Act of September 9, 1850, 9 Stat. 452.

[13] Act of June 10, 1896, 29 Stat. 321, 341.

[14] Petitioners seek to imply that by Article VI of the Hell Gate Treaty it was understood the Tribes and their lands, including the Lake, would come under State jurisdiction. Petition, at 14, n.19. *See also id.* at 10, n.11. But Article VI merely prescribes the rules that would apply if the President, at his discretion, were to (i) provide for allotments, and (ii) assign allotments to tribal members "willing to avail themselves of the privilege." (12 Stat. 977; App. at 212). *See Confederated Salish and Kootenai Tribes v. United States*, 193 Ct. Cl. 801, 810-11 (1971).

[15] *See, e.g.*, Act of March 3, 1905, 33 Stat. 1048, 1080; Act of May 31, 1906, 34 Stat. 205; Act of June 21, 1906, 34 Stat. 325, 354; Act of May 28, 1908, 35 Stat. 251, 267; Act of May 29, 1908, 35 Stat. 444, 448; Act of March 3, 1909, 35 Stat. 781, 795; Act of

Flathead Lake as constituting part of the Reservation. By the Act of March 3, 1909, 35 Stat. 781, 796, Congress provided:

> That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, or other appropriation [pursuant to the 1904 Act] all lands within said Flathead Indian Reservation chiefly valuable for power sites, or reservoir sites, and he shall report to Congress such reservations.

Pursuant to this Act, the Secretary reserved from disposition, for the benefit of the Tribes, lands which included the power sites on the Flathead River plus the south half of the Lake, which is a natural reservoir for those power sites.[16]

The other two acts are the Act of March 3, 1911, 36 Stat. 1058, 1066, providing that any patent for a tract bordering Flathead Lake shall provide that the conveyance is subject to a flowage easement in conjunction with power development [17] and the Act of August 24, 1912, 37 Stat. 518, 527, which amended the easement provision.[18]

April 12, 1910, 36 Stat. 296; Act of June 25, 1910, 36 Stat. 855, 863; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of August 24, 1912, 37 Stat. 518, 527.

[16] *See* note 2 *supra*; *Confederated Salish and Kootenai Tribes v. United States*, 181 Ct. Cl. 739 (1967). *See also Montana Power Co. v. F.P.C.*, 459 F.2d 863 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972); *Montana Power Co. v. F.P.C.*, 445 F.2d 739 (D.C. Cir.), *cert. denied*, 400 U.S. 1013 (1971); *Montana Power Co. v. F.P.C.*, 298 F.2d 335 (D.C. Cir. 1962).

[17] "In the issuance of patents for all tracts of land bordering upon Flathead Lake, Montana, it shall be incorporated in the patent that 'the conveyance is subject to an easement of one hundred linear feet back from the contour of elevation nine feet above the high-water mark of the year nineteen hundred and nine of Flathead Lake, to remain in the Government for purposes connected with the development of water power.' "

[18] "That an easement in, to, and over all lands bordering on or adjacent to Flathead Lake, Montana, which lie below an ele-

The last Act by Congress relating to the Lake was enacted in 1928, when Congress authorized development of the tribal hydroelectric sites. The Act of March 7, 1928, 45 Stat. 200, 212-13, provided:

> That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation . . . *provided* . . . that rentals from such licenses for the use of Indian lands shall be paid the Indians of said reservation as a tribe. . . .[19]

Congress has not acted with respect to Flathead Lake since that time. However, the Secretary has approved a license to develop tribal hydroelectric site #1, and that license is held currently by Montana Power Company.[20] In approving the license, the Secretary recognized tribal ownership of the south half of the Lake and the fact that ownership has been a factor in establishing the annual charges paid the Tribes.[21]

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vation of nine feet above the high water mark of said lake for the year nineteen hundred and nine, is hereby reserved for uses and purposes connected with storage for irrigation or development of water power, and all patents issued for any such lands shall recite such reservation."

[19] Congress, by the Act of March 4, 1929, 45 Stat. 1623, 1639-40, directed the Federal Power Commission, in issuing any permits or licenses under the authorization of the Act of March 7, 1928, to "waive payment of the usual administrative fees or commissions charged under existing laws relating to or under regulations of said Federal Power Commission in the issuance of any such permits or licenses."

[20] The license was issued in 1930 for a 50-year term. Montana Power Company, since expiration of the term, has received annual licenses from the Federal Energy Regulatory Commission, pursuant to 16 U.S.C. § 808(a), pending a hearing on competing applications for a new license filed by the Company and the Tribes.

[21] *See* note 2 *supra*. In approving the 1930 license, the Secretary approved a report that noted: "That bearing in mind the special

SUMMARY OF ARGUMENT

This case simply does not warrant the exercise of certiorari jurisdiction.

1. The Ownership Issue

The court of appeals reviewed all of the arguments presented by petitioners, applied the law as most recently articulated by this Court in *Montana v. United States*, 450 U.S. 544, *reh'g denied*, 452 U.S. 911 (1981), to the specific facts of this case, and ruled against petitioners.

Petitioners are unhappy with losing on the ownership issue, and seek yet one more chance to argue their version of the facts before one more court. That, of course, is not a valid basis for review by this Court.

2. The Regulatory Issue

With respect to the regulatory issue, too, the court of appeals applied principles previously articulated by this Court. Again, the mere fact that petitioners do not like the results does not warrant review. That is especially so in light af the fact that regulation of riparian rights on Flathead Lake is under the plenary power of the federal government, through the Corps of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), and the discharge of pollutants and dredged or fill material in navigable waters by the Clean Water Act of 1977, which amended the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (1976). In other words, any regulation by the Tribes is exercised at the sufferance of the federal government. *See* App. B to this brief.

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powers vested by law in the Secretary of the Interior in this case, provision should be made for complete amortization of the entire development cost within the 50-year period of the lease. . . . This would enable the project in addition to the annual rental to the Indians to pay itself off during the lease and to be turned over to the Government for the Indians as a going concern, to be at that time retained or released as may seem best." Sen. Doc. No. 153, 71st Cong., 2d Sess. 8-9 (1930).

REASONS FOR DENYING THE WRIT

1. The Ownership Issue

Issues involving reservation Indians and their property must be decided by reference to the applicable treaties, statutes and relevant facts.[22] The courts below did just that in ruling, once again,[23] that the bed and banks of the south half of Flathead Lake are owned, to the high-water mark, by the United States in trust for the Confederated Tribes.

The Treaty Council minutes show that the United States wanted the Flatheads, the Kootenais and the Upper and Lower Pend Oreille Indians on one reservation. None of the Tribes wanted to leave its respective aboriginal homelands or to share a reservation; eventually, however, they had to go. The Reservation established by the Treaty included the south half of Flathead Lake, with a surface area of approximately 65 square miles.[24] In the negotiations that led to the Treaty, concern was expressed for the fact that many of the Indians were not hunters,[25] and therefore inclusion of 65 square miles of the Lake within the Reservation would be of vital concern to them.[26]

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[22] *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

[23] The issue was addressed by the district court on three separate occasions and by the circuit court twice.

[24] Petitioners never address the fact that, at issue here, is ownership of approximately 65 square miles.

[25] Alexander, Chief of the Upper Pend Oreille, was concerned that the Lower Pend Oreille, would not leave the "mission", the area generally of the present-day Reservation, because they "have no horses; they have only canoes." *See* Council Minutes at 50, cited in note 7 *supra*. The Ninth Circuit recognized fishing as an important fact in its holding in *Montana Power Co. v. Rochester*, 127 F.2d 189 (1942).

[26] Petitioners, while recognizing that Flathead Lake is the largest fresh water body west of the Great Lakes, apparently are of the position that as such it is indistinguishable from any given river or stream in the western United States.

Petitioners seek to dismiss as insignificant the fact that fishing was a way of life to one of the Tribes party to the Treaty. They do so for the obvious reason that fishing, even off-Reservation fishing, when a part of a treaty right, always has been held by this Court to survive challenges constructed on the equal footing argument. For example, in *United States v. Winans*, 198 U.S. 371 (1905), the issue was whether Indian treaty rights to fish "at all usual and accustomed places, in common with the citizens of the Territory," survived the admission of Washington to the Union (or whether, by its admission "upon an equal footing with the original states", the State had "the power to grant rights in or dispose of the shore lands upon navigable streams.") *Id.* at 382. This Court answered the question in favor of the Indians, by upholding the treaty provisions:

> The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of the case. The power and the rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered throughout the cases which seemed to assert a contrary view.

Id. at 383.

The principle articulated in *Winans* has been cited by the Court in numerous cases upholding treaty fishing rights against challenges based on "equal footing" arguments. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (exclusive fishing rights in navigable waters, submerged lands and adjacent uplands);[27] *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (off-Res-

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[27] The Court's opinion did not explicitly mention the "equal footing doctrine," but it was argued to the Court. *See* Brief for Alaska Pacific Fisheries, October Term, 1918, No. 212.

ervation fishing, Columbia River); *Tulee v. Washington*, 315 U.S. 681 (1942) (off-Reservation fishing rights); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (fishing rights in navigable waters extending 3,000 feet from certain islands);[28] *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (treaty hunting and fishing rights survived termination of Menominee Reservation);[29] *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968), *reh'g denied*, 393 U.S. 898 (off-Reservation fishing rights);[30] *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973) (commercial pursuit of off-Reservation treaty fishing rights); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified*, 444 U.S. 816 (1979) (off-Reservation fishing rights, marine as well as fresh water).[31]

This Court also has rejected, by implication, the proposition that, because of the equal footing doctrine, (i) off-Reservation statutory hunting rights did not survive statehood by relying on *United States v. Winans*, *supra*, and its progeny, in *Antoine v. Washington*, 420 U.S. 194

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[28] "Federal authority was lodged in the Secretary in 1891 [to regulate the Indian fishing under challenge] and it was not dislodged by the Statehood Act." *Id.* at 59.

[29] The State argued that the equal footing doctrine precluded survival of treaty hunting and fishing rights upon dissolution of the Reservation and termination of trusteeship by the United States. *Id.* at 411, n.12.

[30] *Menominee* and *Puyallup* were decided on the same day.

[31] The Court noted: "All of the treaties were negotiated by Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, and a small group of advisers. Contemporaneous documents make it clear that these people recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries. . . ." *Id.* at 666 and nn.8-11. The treaties involved were negotiated in 1854-1855 (*id.* at 661-62), contemporaneously with the 1855 Hell Gate Treaty.

(1975),[32] and (ii) treaty hunting rights in the area of a former Reservation were dissolved by Congress when it terminated federal supervision thereof, *Menominee Tribe v. United States, supra.*

Furthermore, the actions of the Federal Power Commission, in providing for development of a tribal hydroelectric site, and the setting of annual rentals to be paid the Tribes, reflect the congressional position of tribal ownership,[33] and the approval of the initial license and subsequent participation in readjustment of the annual charges paid the Tribes by the Secretary of the Interior, operating under congressional directive, also reflect the congressional position.

Finally, the issue of ownership has been either addressed directly or relied upon in numerous decisions, and the result always has been contrary to the position of petitioners.[34]

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[32] The area involved was once part of an Executive Order Reservation, not a treaty Reservation, established in 1872. Washington became a state in 1889, and it was a year after that before Congress enacted the statutory basis of the hunting rights vindicated by the Court. *Id.* at 197-98.

[33] In hearings on the provisions of the bill that became the Act of March 7, 1928, 45 Stat. 200, 212-13, relating to the development of hydroelectric sites on the Reservation, testimony of the Department of the Interior on the 1914 appropriations bill was made part of the record.

> Senator Townsend. Where is this—on public or Indian domain?
>
> Mr. Newell. On Indian land wholly.
>
> Senator Townsend. And the lands are valuable?
>
> Mr. Newell. We have requested that all lands along the lake be withheld and all lands along the river not allotted. . . .

Hearings before Subcommittee of the Senate Committee on Appropriations, Interior Department Appropriations Bill, Fiscal 1929, 70th Cong., 1st Sess. 53 (1929).

[34] *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942); *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. at 457, n.7; *United States v. Pollmann*, 364 F. Supp. 995, 998-99 (D.

In essence, on the ownership issue, petitioners assert that the court below misread the opinions of this Court and compounded its error by then misapplying its erroneous reading to the wrong facts.[35] Yet, to support this argument, petitioners choose to dwell on treaties other than the Hell Gate Treaty.[36]

Mont. 1973); *Dillon v. Antler Land Co.*, 341 F. Supp. 734, 741 n.16 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *Seifert v. Udall*, 280 F. Supp. 443, 444 n.1 (D. Mont. 1968); *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108, 116 n.8 (D. Mont. 1968); *cf. Montana Power Co. v. F.P.C.*, 459 F.2d 863, 865, 872 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972); *Montana Power Co. v. F.P.C.*, 445 F.2d 739, 742 n.1 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971); *United States v. Bouchard*, 464 F. Supp. 1316, 1335 (W.D. Wis. 1978).

Petitioners seek to minimize the fact that *Montana Power Co. v. Rochester, supra*, has been followed in other proceedings by stating that since Montana Power Co. was a party to those proceedings, it was estopped to challenge the decision. (Petition at 15, n.21). But in each of those proceedings the staff of the then Federal Power Commission appeared and presented its position independently of Montana Power Co., the Tribes and the Secretary of the Interior. *See, e.g., The Montana Power Co.*, Project No. 5, 38 FPC 766 (October 4, 1967); *The Montana Power Co.*, Project No. 5, 25 FPC 221, 222 (January 30, 1961) ("This proceeding is reopened for the purpose of affording an opportunity to the parties thereto, including Commission staff, to present such additional evidence as they may deem to be material and relative to the issues involved, . . ."

[35] Petition at 7-14.

[36] Petitioners, aware that one of the Tribes party to the Hell Gate Treaty negotiations relied on fishing (*see* note 25 *supra*), suggest this is an irrelevant consideration, because they read the Treaty as excluding the Lake from exclusive treaty fishing rights. (Petition at 12). Petitioners apparently suggest that their position is somehow improved because the Indians had words for "stream", "river" and "lake" (Petition at 12 and nn.15, 16). Petitioners' argument, however, supports the court below, since it was the United States that drafted the Treaty, selected the language, and included an area of approximately 65 square miles of the Lake in the Reservation. Even a casual reading of the Council minutes shows this Treaty was not "negotiated" but rather "imposed" on

Petitioners also seek support for their request for review by referring to facts and events that occurred long after the Treaty was negotiated, but the relevant history to the Treaty supports the court below.[37]

The Namens also assert that, even if the south half of the Lake is held by the United States in trust for the Tribes, they own to the low-water mark, relying on *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).[38] Petitioners assert that this question was not addressed below; it was, by the district court and the court of appeals, and each court ruled to the contrary. As Petitioners concede, there is no need for a uniform national rule;[39] and, indeed, there cannot be one, for each case involving treaty property must be resolved by the circumstances surrounding the treaty negotiations, the specific language of the treaty and the relevant historical facts. Here, all were reviewed by the courts below, as they had been previously in *Montana Power Co. v. Rochester*, *supra*, and the earlier conclusion reaffirmed, that the patent conveyed only to the high-water mark.

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the Tribes, but in the process of imposition the government included as an integral part of the Reservation the south half of the Lake.

[37] The subsequent ownership pattern within the Reservation that developed after the Act of April 23, 1904, 33 Stat. 302, is irrelevant to determining the effect of the 1855 Treaty. The total acreage transferred to non-Indians for villa and town sites pursuant to the Act of April 23, 1904, was 5,374.86. *Confederated Salish and Kootenai Tribes v. United States*, 193 Ct. Cl. 801, 839 (1971). The Reservation encompasses approximately 1,245,000 acres (*id.* at 807) of which 485,171.31 were disposed of pursuant to the 1904 Act (*id.* at 839). The lands were disposed of between 1910 and 1935 (*id.* at 824, n.40).

The ten-foot drawndown referred to by petitioners results from the operation of the hydroelectric facility developed at the tribal site, licensed in 1930 but not operational until 1939. *See* 38 F.P.C. 766, 774 (1967).

[38] Petition at 19.

[39] Petition at 21.

Not only is this issue not one that warrants the attention of this Court; it was correctly decided below, and petitioners suffer no harm.[40]

2. The Regulatory Issue

Petitioners also ask this Court to review the ruling of the court of appeals that the Tribes may reasonably regulate the exercise of federal common law riparian rights by non-Indian landowners along the south half of Flathead Lake. Respondents submit that the court of appeals carefully applied the principles articulated by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), to the facts of this case; that its decision is correct; and that the decision presents no issue worthy of review by this Court.

It is well-settled that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Santa Calra Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

In its most recent decisions on the issue, this Court has reaffirmed and emphasized the fact that Indian tribes do possess some measure of civil regulatory authority over non-Indians.[41] In *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*, this Court upheld

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[40] Under the decision below, the Namens are accorded riparian rights of access and wharfage.

[41] In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court concluded that the inherent authority of tribes does not extend to criminal prosecution of non-Indians within their reservations. This Court found that tribes still retain those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, and responded that exercising criminal jurisdiction over non-Indians was inconsistent with that status. *Id.* at 208.

the power of a Tribe to tax non-Indian purchases of cigarettes on a Reservation, applying the principle that tribal authority is divested only "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . ." 447 U.S. at 153. And, in *Montana v. United States*, *supra*, the Court, while striking down a Crow tribal ordinance banning all hunting and fishing by non-Indians on fee lands on the Reservation, upheld the right of the Crow Tribe to regulate hunting and fishing on tribal trust lands. Furthermore, the Court stated that tribes may regulate non-Indians even on fee lands when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

The court of appeals correctly applied *Colville* and *Montana* to the Tribes' Shoreline Protection Ordinance, and held that that modest regulatory measure is within the authority of the Tribes. First, applying the *Colville* reasoning, the court noted that there are no significant federal interests impaired by tribal regulation of non-Indian riparian rights. Indeed, the court of appeals pointed out, the United States itself has participated on the Tribes' behalf in this lawsuit, and has argued that, rather than interfering with overriding federal interests, the Tribes' Ordinance actually furthers the United States' anti-pollution interests. *Namen III*, *supra*, 665 F.2d at 963-64.[42]

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[42] The Namens weakly suggest two overriding federal interests —protecting non-Indians' interests under the Bill of Rights, and ensuring that the "justifiable expectation" of the nonmembers "enticed" onto the Reservation by a federal sales pitch are not frustrated. The court of appeals gave these same assertions the short shrift they deserve. The court pointed out in a footnote that the first argument would preclude *any* tribal jurisdiction over non-Indians, a result clearly not mandated by this Court, and the second ignores the far more significant expectations of the Tribes resting on explicit treaty guarantees. *Namen III*, *supra*, 665 F.2d at 963-64, n.30; App. at 31, n.30. Furthermore, it seems absurd that peti-

Second, noting this Court's recognition of the right of the Crow Tribe to regulate non-Indian hunting and fishing on tribal trust lands, and noting that the banks of Flathead Lake are held, to the high-water mark, by the United States in trust for these Tribes, the court of appeals observed that the Tribes here seek only to regulate non-Indian use of their own tribal trust property, by controlling structures extending onto Flathead Lake. It held, therefore, that, under *Montana*, the Tribes' governmental authority encompasses this form of regulation.

Furthermore, even apart from their ownership of the bed and banks of the south half of Flathead Lake, the court of appeals held that the Tribes' inherent sovereignty extends to regulation through the Shoreline Protection Ordinance because the Ordinance seeks to regulate an activity that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, *supra*, 450 U.S. at 566. The court noted that the conduct that the Tribes seek to regulate herein, if unregulated, "could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." *Namen III*, *supra*, 665 F.2d at 964.[43]

The correctness of the court of appeals' ruling on the Tribes' Shoreline Protection Ordinance is buttressed by this Court's recent decision in *Merrion v. Jicarilla Apache Tribe*, 50 U.S.L.W. 4169 (U.S. January 25, 1982), in which the Court ruled that the Jicarilla Apache Tribe has

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tioners would continue to suggest the presence of overriding federal interests when the federal government itself has taken the opposite view.

[43] The Namens deposited an estimated 174,000 cubic feet of rock and dirt into the Lake. *See* note 1 *supra*, and accompanying text. The Namens also assert there are approximately 1,400 docks and wharves on the south half of the Lake (Petition at 4, n.2). If each riparian owner made a landfill such as the Namens for each dock or wharf, the Lake would receive 24,360,000 cubic feet of rock and dirt.

inherent sovereign authority to impose a severance tax on non-Indians removing oil and natural gas from tribal lands. Citing its decision in *Colville*, the Court again recognized that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." 50 U.S.L.W. at 1471. It quoted with approval the language in *Colville* that "Indian tribes have a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Id.* The Confederated Tribes' significant interest in non-Indian activities on the south half of Flathead Lake has been amply demonstrated in this case.[44]

Moreover, the Tribes' Shoreline Protection Ordinance has been incorporated by the Corps of Engineers in its regional permit for Flathead Lake (*see* App. B to this brief). It is the federal government, of course, which has ultimate authority over both the Tribes and over the federal riparian rights which the Tribes seek to regulate. Not surprisingly, petitioners choose completely to ignore this point.

In addition, the Confederated Tribes are organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.* ("IRA"). Article VI of their Constitution, approved by the Secretary of the Interior in 1935, empowers the Tribal Council to promulgate and enforce ordinances to promote the peace, safety, morals, and general welfare of the Tribes, provided that "any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior." Article VI, Section 1(n). Ordinance 64A (Revised) was adopted pursuant to these provisions and, as expressly required, was submitted to and approved by the Secretary of the Interior in 1977 (App. at 285). According to its

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[44] *See, e.g.*, note 43 *supra*.

own terms, any amendments to Ordinance No. 64A must also be approved by the Secretary of the Interior.[45]

The Ordinance also comports with the congressional regulatory scheme for navigable waters of the United States. It is well-settled that Congress, through its constitutional power to regulate commerce, has ultimate control of navigable waters within the country. Congress has exercised this power through the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (1976), which forbids construction on any navigable water without a United States Army Corps of Engineers permit (33 U.S.C. § 403), and through the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (1976), which governs dredging and discharge of fill material or pollutants into all waters of the United States.

Under these laws, Congress contemplated a cooperative, joint, regulatory scheme, with federal regulation of all United States navigable waters supplemented by "local" regulation of navigable waters within specific jurisdictions. In 33 U.S.C. § 1251(g), Congress proclaimed as its federal policy that "[f]ederal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[46]

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[45] App. at 284. In *Merrion v. Jicarilla Apache Tribe, supra*, this Court concluded that these constraints on IRA Tribes "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies." 50 U.S.L.W. at 4172.

[46] Furthermore, 33 C.F.R. § 320.4(j) provides in relevant part:

> *Other Federal, state or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, State, and/or local authorizations or certification. *Where the required Federal, State and/or local certification and/or authorization has been denied, the application for a Department of the Army permit will be denied without*

The United States, in implementing its policy of joint federal and local control, has incorporated application of the Tribes' Shoreline Protection Ordinance in its regional permit for Flathead Lake. The permit states:

> I. *Special Conditions*
>
> 1. . . . . The work [described in this Regional Permit] is authorized after final approval has been obtained from the state and applicable local government or *when appropriate, the Confederated Salish and Kootenai Tribes of the Flathead Reservation.*
>
> 2. This permit is applicable only to activities which are performed in accordance with rules and regulations of the Montana Lakeshore Protection Act of 1975 if outside the Flathead Indian Reservation, *or the Tribes' Shoreline Protection Ordinance, Ordinance 64A (Revised), when appropriate and if within the boundary of the Flathead Indian Reservation.* (Emphasis added.) [47]

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prejudice to the right of the applicant to reinstate processing of his application if subsequent approval is received from the appropriate Federal, State and/or local agency. . . . (Emphasis added.)

[47] App. B to this brief at 2. Petitioners suggest, as they did before the court of appeals, that the Tribes' Shoreline Protection Ordinance violates the equal protection and due process guarantees of the fifth amendment because it regulates persons who are not eligible to participate in tribal government. Petition at 27-30.

First, petitioners' assertion is simply incorrect. Non-Indians may have direct involvement in administration of the Ordinance's regulatory scheme. Under Section 8, the Shoreline Protection Board, which has broad responsibility for, *inter alia*, issuance and denial of permits or variances, is composed of seven members, no more than four of whom may be enrolled tribal members. And, although initial review of the Board's action may be by the Tribal Council, persons may appeal the Council's decision to an independent tribunal, the Tribal Court. Ordinance 64A (Revised), §§ 9, 10.

Second, even if petitioners' argument were correct, under the decisions of this Court, it fails on both jurisdictional and substan-

The federal government thus has recognized that the Tribes' Shoreline Protection Ordinance is nothing more than a reasonable local law, setting forth appropriate limitations upon the exercise of riparian rights in an effort to protect navigability, the public safety and welfare, and the Lake's environment.

There is absolutely no reason for this Court to devote a substantial portion of its valuable but limited time and resources to review the legality of a tribal Ordinance that has been carefully reviewed and approved by the United States Court of Appeals for the Ninth Circuit and the Department of the Interior and adopted by the Department of the Army—and that is, at all times, subject to the ultimate authority of the federal government over the Tribes and over navigable waters of the United States.

Certiorari to review the regulatory issue should, therefore, be denied.

CONCLUSION

The only real issues petitioners raise turn on the particular facts of this case and this case alone. Indeed, it is inherent in the issues that each was decided on the basis of unique treaties, statutes and historical facts. In essence, the petitioners ask the court to make a third

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tive grounds. First, the Tribes are subject to the equal protection and due process guarantees of the fifth amendment only through the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (1976) ("ICRA"), and this Court has held in *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. 49, that federal habeas corpus is the only remedy available in federal court to enforce that statute. *See Namen III, supra*, 665 F.2d at 964. Nothing in the ICRA or *Martinez* indicates, as petitioners argue, that the jurisdictional limitation applies only to tribal "self"-government.

Finally, the argument itself—even if it were properly before this Court—already has been rejected by this Court in *United States v. Mazurie*, 419 U.S. 544, 557. *See Namen III, supra*, 665 F.2d at 964. Furthermore, this Court has upheld tribal civil jurisdiction over non-Indians in *Colville*, *Montana* and *Jicarilla*, and in none of these cases was the non-Indian eligible to participate in tribal government.

review of facts that have consistently been the bases of legislative, executive, administrative and judicial action supporting the position of the courts below.

Perhaps more importantly, resolution of issues presented by the petition is of interest only to the parties before this Court.[48] They have no national significance. No new issues are presented. No new law has been proclaimed—there has been only a careful application by two federal courts of settled principles to a single treaty relating to only one Indian reservation.

Certiorari should be denied.

Respectfully submitted,

RICHARD ANTHONY BAENEN
Counsel of Record
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800
Attorney for the Confederated Salish and Kootenai Tribes and Thomas E. Pablo

Of Counsel:
WILKINSON, CRAGUN & BARKER
EDWARD M. FOGARTY
SUSAN O. BERGHOEF

[48] The case is, of course, extremely important to the respondent Tribes, who currently receive $2.6 million annually for their developed hydroelectric site. *See* notes 2 and 21 *supra*. Petitioners seek to overturn this recognized ownership and accomplish, in part, what Senator Wheeler of Montana predicted when he testified on the provisions of the bill that permitted licensing of tribal hydroelectric sites, the Act of March 7, 1928, 45 Stat. 200, 212-13:

> The Indians are very skeptical that this property is going to be taken away from them. A great many Indians on the Flathead Reservation in a few years are going to be absolute paupers unless they are provided for, and they feel that this water-power site, belonging to them, is something that will bring in a revenue to them during their lives and during the lives of their children, and will keep them from going to the poor house.

Hearings before Subcommittee of Senate Committee on Appropriations, Interior Department Appropriations Bill, Fiscal 1929, 70th Cong., 1st Sess. 21 (1929).

APPENDIX A

THE LIFE OF

ISAAC INGALLS STEVENS

BY HIS SON

HAZARD STEVENS

WITH MAPS AND ILLUSTRATIONS

IN TWO VOLUMES

VOL. II

RIGGS LIBRARY,
GEORGETOWN UNIVERSITY,
WASHINGTON, D. C.

BOSTON AND NEW YORK
HOUGHTON, MIFFLIN AND COMPANY
The Riverside Press, Cambridge
1901

F880.S84s- vol.2

APPENDIX B

[SEAL]

DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
P.O. Box C-3755
Seattle, Washington 98124

NPSOP-RF 6 August 1982

Reference: 071-OYB-4-007899
Regional Permit
Flathead Lake, Montana

The inclosed Regional Permit 071-OYB-4-007899 authorizes the general public to install various types of structures in Flathead Lake, Montana. This Regional Permit was issued by the Seattle District Engineer on 28 July 1982. The authorized work is to place rock fill for log crib piers, place concrete and backfill for piers, place fill and concrete for boat ramps, place concrete for support (ties) used for boat launching rails, and place concrete for anchors used for mooring buoys, small floats, water withdrawal systems, and boat lift stations. The work is limited to noncommercial use and is subject to the conditions contained in the Regional Permit.

Issuance of this permit is authorized by the Secretary of the Army in accordance with Section 404 of the Clean Water Act.

For additional information, please contact Mr. Russ McCutchen, telephone (206) 764-3495.

Sincerely,

/s/ GERALD A. KELLER
Chief, Regulatory Functions Branch

1 Incl
Regional Permit

[SEAL]

DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
P.O. Box C-3755
Seattle, Washington 98124

NPSOP-RF 28 July 1982

DEPARTMENT OF THE ARMY PERMIT

REGIONAL PERMIT
FLATHEAD LAKE, MONTANA
071-OYB-4-007899

Referring to Public Notice No. 071-OYB-4-007899 proposing a Regional Permit to:

Perform work in or affecting waters of the United States upon the recommendation of the Chief of Engineers, pursuant to Section 404 of the Clean Water Act, the general public is hereby given authority by the Secretary of the Army:

to

1. Place rock fill for log crib piers.
2. Place concrete and backfill for piers.
3. Place fill and concrete for boat ramps.
4. Place concrete for support (ties) used for boat launching rails.
5. Place concrete for anchors used for mooring buoys, small floats, water withdrawal systems, and boat lift stations.

limited to noncommercial use

in Flathead and Lake Counties, Montana

subject to the following conditions:

I. *Special Conditions:*

1. For all work described in this Regional Permit, separate state and local approvals and/or permits are required as well. This permit only satisfies Federal law and does not satisfy state and local requirements including leasing of the submerged lands, zoning, building, hydraulic, encroachment, or other required permits. The work is authorized after final approval has been obtained from the state and applicable local government or when appropriate, the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

2. This permit is applicable only to activities which are performed in accordance with rules and regulations of the Montana Lakeshore Protection Act of 1975 if outside the Flathead Indian Reservation, or the Tribes' Shoreline Protection Ordinance, Ordinance 64A (Revised), when appropriate and if within the boundary of the Flathead Indian Reservation.

3. All other fill activities in the Flathead Lake not covered by this Regional Permit require authorization by separate Department of the Army permits or authorization.

4. This permit shall become effective on the date of the District Engineer's signature. The expiration date of this Regional Permit shall be 5 years from the effective date of the permit.

5. This permit may be revoked by issuance of a public notice at any time the District Engineer determines that the singular or cumulative effects of the activities authorized herein have an adverse effect on the public interest. Following such revocation, any future activities in areas covered by this Regional Permit will be processed as individual permits.

6. The permittee, upon notice of the revocation of this permit, shall, without expense to the United States and in

such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

7. The permittee hereby recognizes the possibility that any structure permitted herein may be subject to damage by wave wash from passing vessels or flooding. The permittee shall not hold the United States liable for any such damage. The issuance of this permit does not relieve the permittee from taking all proper steps to insure:

a. The integrity of the structure permitted herein.

b. The safety of boats stored or moored thereto from damage by wave wash.

8. The permittee shall not hold the city, county, state, tribal, or Federal Government responsible for the maintenance of the bottom or beach line location.

9. The permittee must have the legal right to use and occupy the affected submerged land.

10. No fill permitted herein shall be placed in such a way that it would restrict movement of vessels using existing facilities.

11. No fill permitted herein shall be placed in such a way to affect archaeological sites or other cultural resources. All anchoring systems for mooring buoys, launching rails, boat lift stations, etc., must not be buried below the lakebed surface.

12. No fill permitted herein shall be placed in the mouth of any river, stream, or creek or in a location adjacent to the mouth of a stream or creek which would alter inflow current patterns or affect natural deposition of gravel.

13. Filling in the Flathead Lake will be done in such a manner to minimize turbidity which tends to degrade water quality and damage aquatic life.

14. Fill material will consist of suitable material free from toxic pollutants in other than trace quantities.

15. Fill material will be properly maintained to prevent erosion and other nonpoint sources of pollution.

16. All construction debris will be disposed in such a manner that it cannot enter Flathead Lake.

17. Ordinary high water for the Flathead Lake hereafter means 2893.0 feet above the National Geodetic Vertical Datum.

18. Rock fill for log crib piers:

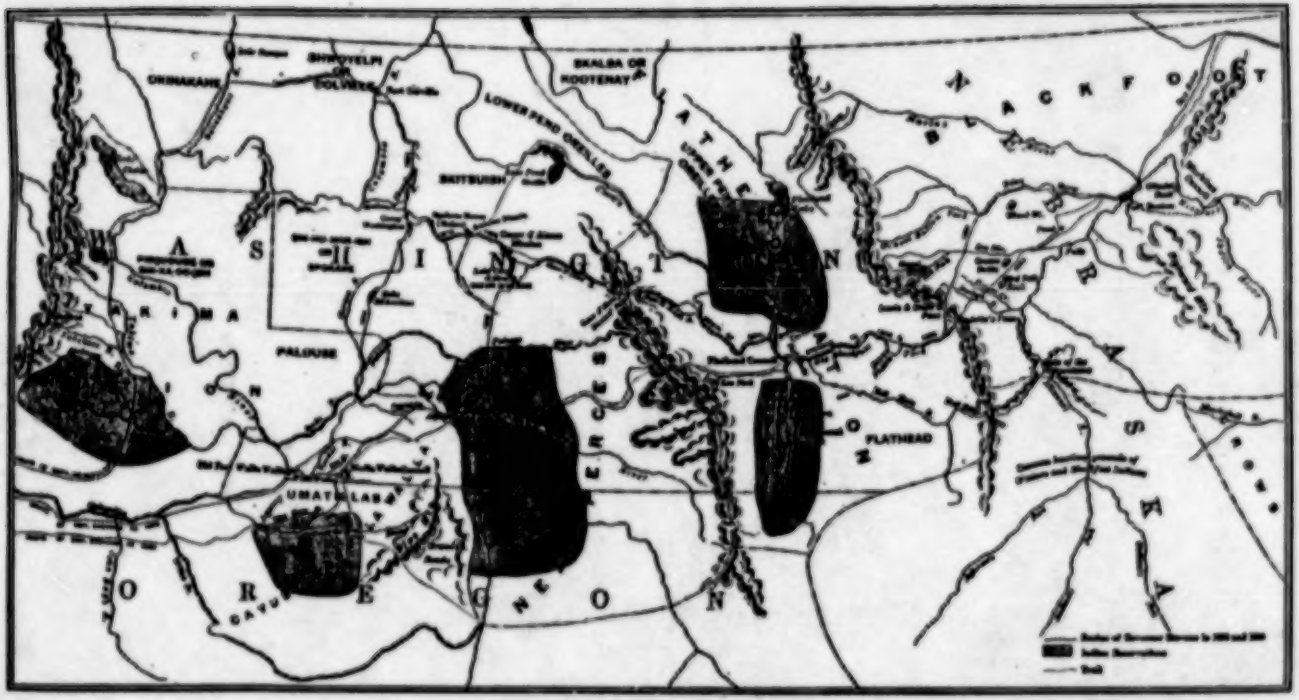
a. This permit authorizes placement of rock fill in only one pier, including an access ramp if necessary, contiguous to the shoreline per upland private property ownership. This property must be adjacent to Flathead Lake.

b. All rock fill placed in crib piers shall exceed 4 inches in diameter. Any fill that is placed in crib piers shall consist of clean rock and be free of any fine materials such as sand, silt and clay.

c. All fill that is placed in log crib piers shall be obtained from a source outside the lake, lakebed, and lakeshore protection zone. The lakeshore protection zone, as defined by local governments, includes the land area which are within 20 feet horizontally of the lake or adjacent wetlands when the lake is at ordinary high water.

d. No other structures such as living quarters, toilets or fueling facilities shall be constructed or installed on any crib pier.

e. No solid (filled) section of the crib pier (sidewall) shall exceed 20 feet in length.



THE INTERIOR FROM CASCADE MOUNTAINS TO FORT BENTON

f. A minimum of one-half (½) the total length of the sidewall of any pier greater than 20 feet in length shall remain open as free water transfer areas. The freewater area is that open area beneath a pier which is totally free of any obstructions to water transfer under the structure.

(1) All free water transfer areas shall be at least 8 feet in length as measured along the sidewall portion of the pier.

(2) One of the free water transfer areas shall be located at the ordinary high water line and extend waterward a minimum of 8 feet.

g. Rock fill for crib piers shall not be placed more than 60 feet waterward of the ordinary high water line. The crib width shall not exceed 8 feet.

h. Total crib fill area waterward of the ordinary high water line, including existing structures, shall not exceed 400 square feet for each upland private property. Maximum rock fill in the crib pier shall not exceed 150 cubic yards.

i. The solid (fill) section of the breakwater wing portion of a pier which is reasonably parallel to the shoreline, shall not exceed 25 feet in length.

j. This permit authorizes placement of rock fill in joint-use private crib piers constructed by more than one private property ownership, or by a home owner's association proprietorship.

k. Total crib fill area waterward of the ordinary high water line, including existing structures, shall not exceed 600 square feet for joint-use crib piers. Maximum rock fill in crib pier shall not exceed 250 cubic yards.

l. Rock fill for joint-use crib piers shall not be placed more than 60 feet waterward of the ordinary high water line. The crib width shall not exceed 8 feet.

m. The solid (fill) section of the breakwater wing portion of a pier which is reasonably parallel to the shoreline shall not exceed 50 feet in length for joint-use crib piers.

n. Joint-use properties shall be adjacent to Flathead Lake.

o. All affected joint-use property owners must sign a legal agreement to construct a joint-use crib pier.

19. Concrete supported piers:

a. Concrete supports may be used in lieu of rock fill material to support a pier.

b. Concrete supported piers shall not extend more than 60 feet waterward of the ordinary high water level.

c. The deck width shall not exceed 8 feet.

d. Any excavation or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

e. Any material that is excavated to construct the concrete pier supports and not used as backfill shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake or wetland areas.

f. No solid (concrete) section of a concrete-supported pier (sidewall) shall exceed 20 feet in length.

g. A minimum of one-half (½) the total length of the sidewall of any pier greater than 20 feet in length shall remain open as free water transfer areas. The free water area is that open area beneath a pier which is totally free of any obstructions to water transfer under the structure.

h. No other structures such as living quarters, toilets or fueling facilities shall be constructed or installed on any concrete supported pier.

i. Total deck area waterward of the ordinary high water line, including existing structures, shall not exceed 656 square feet (access pier 52-feet by 8 feet and pierhead 30 feet by 8 feet) for each upland private property. The area for the concrete footing shall not exceed 200 square feet. The quantity of concrete other than the decking above the water shall not exceed 40 cubic yards.

j. A solid concrete breakwater along the wing portion of a pier which is reasonably parallel to the shoreline shall not exceed 25 feet in length.

k. This permit authorizes joint-use private piers constructed by more than one private property ownership, or by a home owner's association proprietorship.

l. Total deck area waterward of the ordinary high water line, including existing structures, shall not exceed 896 square feet (access pier 52-feet by 8 feet and pierhead 60 feet by 8 feet) for joint-use concrete piers. The areas for the concrete footings shall not exceed 300 square feet. The quantity of concrete other than the decking above the water shall not exceed 60 cubic yards.

m. A solid concrete breakwater along the wing portion of a joint-use pier which is reasonably parallel to the shoreline shall not exceed 50 feet in length for joint-use crib piers.

n. Joint-use properties shall be adjacent to Flathead Lake.

o. All affected joint-use property owners must sign a legal agreement to construct a joint-use pier.

20. Concrete boat ramps:

a. Concrete boat ramps shall not extend more than 60 feet waterward of the ordinary high water line.

b. The concrete boat ramp width shall not exceed 10 feet. The concrete ramp surface shall not exceed 6 inches in thickness. The quantity of concrete placed in the boat ramp shall not exceed 11 cubic yards.

c. The waterward end of the concrete boat ramp shall be the same elevation as the surrounding lakebed.

d. The maximum depth of fill material placed for a foundation under the concrete boat ramp shall not exceed 1 foot.

e. The quantity of fill material placed for a foundation under the concrete boat ramp shall not exceed 22 cubic yards. The foundation fill material shall be obtained from a source outside the lake, lakebed and lakeshore protection zone.

f. Fill material that is exposed along the sides of the concrete boat ramp shall be riprapped with angular rock at least 10 inches in diameter to help avoid washing under the structure. Riprap along the sides shall begin at least 4 feet landward of the ordinary high water line and extend to the most waterward portion of the ramp. If the shoreline is stabilized with an existing retaining wall, riprap along the sides shall begin at the retaining wall if less than 5 feet landward of the ordinary high water line.

g. The quantity of riprap used to cover the exposed sides of the fill shall not exceed 5 cubic yards.

h. Maximum grade of a finished boat ramp shall be 15 percent and no natural slope in excess of 45 percent grade shall be disturbed by construction of a boat ramp.

i. Any excavation or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

j. Any material that is excavated to construct a concrete boat ramp and not used as ramp foundation material shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake.

21. Concrete support (ties) used for boat launching rails:

a. This permit authorizes the installation of one marine launching rail system per upland private property ownership. This property must be adjacent to Flathead Lake.

b. If a boat launching ramp exists on the property, this permit authorizes only marine launching rails installed on the existing ramp surface.

c. Marine launching rails shall not extend more than 100 feet waterward from the ordinary high water line.

d. Marine launching rails shall be anchored to the surface of the lakebed or to suitable railroad-type ties. Buried concrete anchors are not authorized.

e. Any excavation to obtain proper grade or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

f. Any material that is excavated to obtain proper grade shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake.

g. The size of the concrete support shall be limited to that necessary to provide the needed foundation. In no case shall the amount of concrete used for a single concrete support (tie) for boat launching rails exceed 1 cubic yard.

22. Concrete anchors placed for mooring buoys and/or small floats:

a. Concrete anchors for mooring buoys and/or small floats shall not be placed more than 100 feet waterward of the ordinary high water line.

b. Concrete anchors shall contain no more than 1 cubic yard of concrete.

c. Only one concrete anchor for a small float or mooring buoy shall be installed per upland private property ownership. This property must be adjacent to Flathead Lake.

d. Concrete anchors shall be placed on the surface of the lakebed. Buried concrete anchors are not authorized.

e. Activities involving wet or formed cement shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

23. Concrete anchors placed for water withdrawal systems shall be limited by the following conditions:

a. This permit authorizes installation of one water withdrawal system using concrete anchors per upland private property ownership. This property must be adjacent to Flathead Lake.

b. Intake structures shall not be installed to a depth greater than 16.5 feet below ordinary high water.

c. The intake pipe shall be no greater than 4 inches in diameter (nominal).

d. Intake screens shall be provided. Maximum intake screen mesh size shall be 0.125 inches.

e. The water velocity through the intake screen shall be no greater than 0.5 feet per second.

f. The amount of concrete used in a single concrete anchor for the water withdrawal system shall not exceed 1 cubic yard.

g. Water withdrawal piping and pumps shall be anchored to the surface of the lake bed within 12 inches from the bottom or anchored to fixed structures.

h. Concrete anchors shall be placed on the surface of the lakebed. Buried concrete anchors are not authorized.

i. Activities involving wet or formed cement shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact Flathead Lake is normally at low pool between the months of January through April.

24. Concrete anchors for boat lift stations shall be limited by the following conditions:

a. This permit authorizes a maximum of two portable lift stations using concrete anchors per upland private property ownership. This property must be adjacent to Flathead Lake.

b. Boat lift stations shall not be installed more than 52 feet waterward of the ordinary high water line.

c. Boat lift stations shall be located adjacent to existing floats, piers, or walkways.

d. Boat lift stations shall not be located waterward (toward middle of lake) of existing piers, floats, or walkways.

e. The quantity of concrete used for the footings of one boat lift station shall not exceed 4 cubic yard.

f. Concrete footings for boat lift stations shall be placed on the surface of the lakebed. Buried concrete footings are not authorized.

25. To be authorized under this Regional Permit, the permittee must submit to the Seattle District Engineer

within 10 days after completion of the work within Flathead Lake, the following information:

a. Regional Permit number.

b. Name of property owner or lessee

Mailing address

Telephone

c. Description of the work.

d. Address where structure exists, including section, township, range, latitude, longitude, street address, city, county, and state.

e. Name of bay or cove, if applicable.

f. Local government.

g. Date structure was substantially completed.

h. Statement of compliance with all conditions of this Regional Permit.

i. Signature and date.

The information shall be submitted in the format identified in Appendix B.

NOTE: Sketches of typical installations are furnished for general information in Appendix A.

II. *General Conditions*:

1. That all activities identified and authorized herein shall be consistent with the terms of this permit; any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit and may result in the modification, suspension, or revocation of this permit, in whole or in part.

2. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of fill into waters of the United States, be at all times consistent with applicable water quality standards,

effluent limitations and standards of performance, prohibitations, pretreatment standards and management practices established pursuant to the Clean Water Act (P.L. 92-500; 86 Stat. 816) or pursuant to applicable state and local law.

3. That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

4. That the fill will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

5. That the permittee agrees to make every reasonable effort to prosecute the work authorized herein in a manner so as to minimize any adverse impact of the work on fish, wildlife, and natural environmental values.

6. That the permittee agrees to prosecute the work authorized herein in a manner so as to minimize any degradation of water quality.

7. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under

authority of this permit is in accordance with the terms and conditions prescribed herein.

8. That the permittee shall maintain the structure or work authorized herein in good condition.

9. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property, invasion of rights, or any infringement of Federal, state, or local laws or regulations, nor does it obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

10. That this permit does not authorize the interference with any existing or proposed Federal project, and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

11. That this permit may be either modified, suspended, or revoked, in whole or in part, if the Secretary of the Army or his authorized representative determines that activities identified and authorized within the terms or conditions of this permit are not in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after issuance of public notice of such action. Within this 30-day period, permittees may request a public hearing to be held to present oral and written evidence concerning the proposed modification, suspension, or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend, or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

12. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

13. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

14. That if and when the permittee desires to abandon the activity authorized herein, he must restore the area to a condition satisfactory to the District Engineer.

15. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

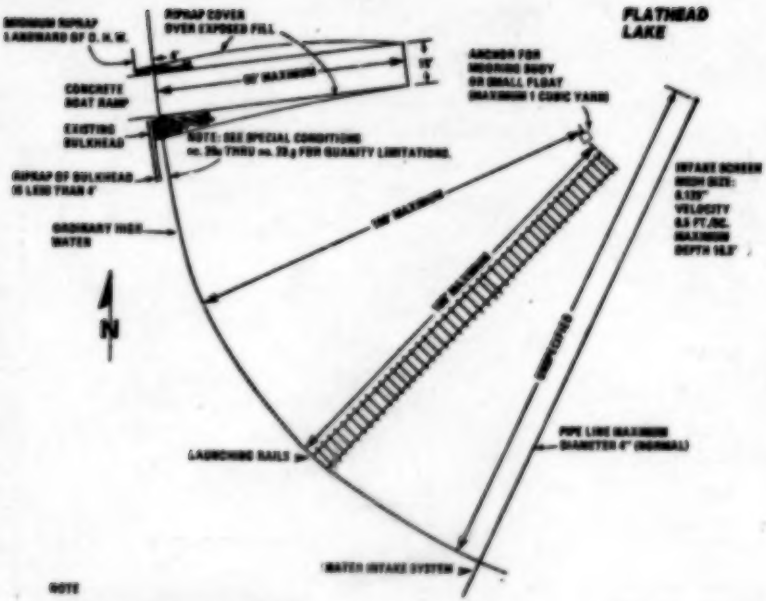
16. The word "permittee" shall include such permittee's successors in interest.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

28 Jul 1982

/s/ Norman C. Hintz
NORMAN C. HINTZ
Colonel, Corps of Engineers
District Engineer

APPENDIX A
SKETCH OF TYPICAL INSTALLATIONS

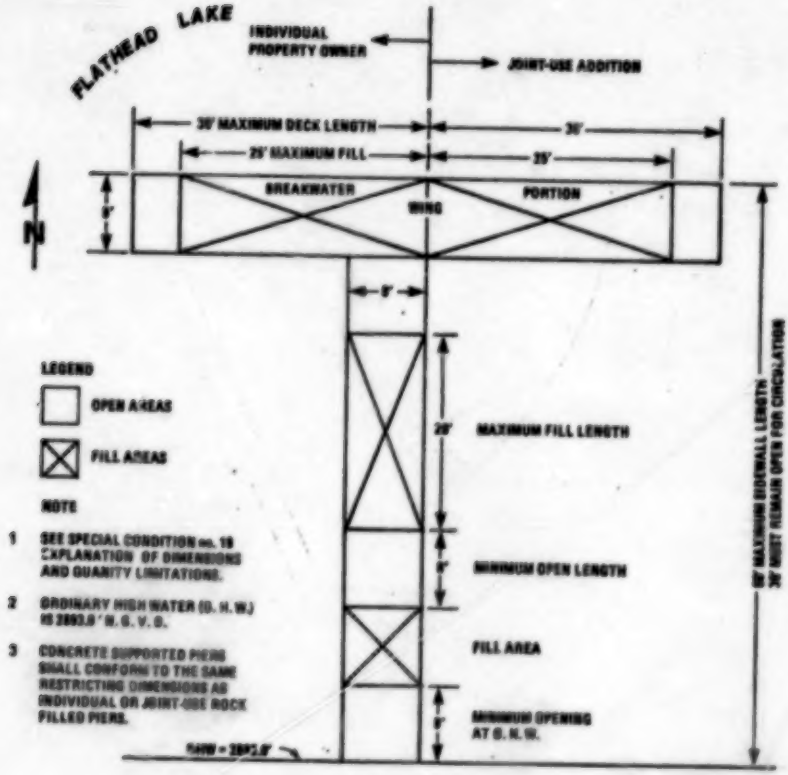


NOTE

REGIONAL PERMIT
FLATHEAD LAKE
SPT - OYB - 4 - 007000

SHEET 1 of 2

APPENDIX A
SKETCH OF TYPICAL INSTALLATIONS



REGIONAL PERMIT
FLATHEAD LAKE
071 - OYB - 4 - 007896

SHEET 2 of 2

APPENDIX B

STATEMENT OF COMPLIANCE

REGIONAL PERMIT
FLATHEAD LAKE, MONTANA
071-OYB-4-007899

1. Name of property owner or lessee:
2. Mailing address:
3. Telephone:
4. Description of work:
5. Location where structure exists:

   Latitude— Township— Range—

   Section— Longitude—

   Street address—

   City—

   County— State—
6. Name of bay or cove, if applicable:
7. Local government:
8. Date structure was substantially completed:

I certify that I have complied with all the conditions of this Regional Permit.

Signature of Permittee Date

Office - Supreme Court, U.S.
FILED
SEP 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-22

In The

Supreme Court of the United States

October Term, 1982

JAMES M. NAMEN, et al., and STATE OF MONTANA,
Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., and UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JAMES M. NAMEN, et al., and STATE OF MONTANA,
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Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Rather than come to grips with *Montana v. United States,* 450 U.S. 544, reh. den. 452 U.S. 911 (1981), both Respondents attempt to slip its bonds by directing attention away from its basic holdings on the ownership issue. Thus, neither Respondent will concede that *Montana v. United States* requires that one must commence his interpretation of the Hellgate Treaty[1] with a strong presumption against conveyance of Flathead Lake prior to statehood or that to effectuate such a result required "clear" and "special" words. 450 U.S. at 552. Scant attention is paid to the fact that in the Treaty of Fort Laramie, 1868,[2]

[1]Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

[2]Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649.

and subsequent legislation,[3] specific reference was made to the Yellowstone and Big Horn Rivers, yet this Court held that without appropriate language directed to the riverbed, the constitutional presumption would prevent alienation of navigable waters to any but the future state, despite the fact that the Crow Indian Reservation wholly embraced the Big Horn River. 450 U. S. at 554.

Respondents attempt to reduce *Montana v. United States* to an *ad hoc* decision only one year after it was rendered. They rely upon facts which are not dissimilar from those studied by this Court earlier.

Subsequent case law held and legislation intimated the Big Horn River was tribal territory.[4] However, the focus of this Court's attention was not post-treaty events but, rather, what did the treaty say? 450 U. S. at 554. Since the treaty *itself* did not "make the riverbed part of the conveyed land, especially when there was no express reference to the riverbed that might overcome the presumption against conveyance," there was in fact no conveyance. 450 U. S. at 554. The language in the Treaty of Hellgate is substantively indistinguishable.

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[3]Act of July 15, 1958, P.L. 85-523, 72 Stat. 351; Act of April 11, 1882, Chap. 74, 22 Stat. 42; Act of March 3, 1891, Chap. 543, 26 Stat. 981, 1039-40.

[4]*United States v. 5677.94 Acres of Land*, 152 F. Supp. 861, 863 (D. Mont., 1957); *United States v. 5677.94 Acres of Land*, 162 F. Supp. 108, 117 (D. Mont., 1958); *Crow Tribe of Indians v. United States*, Civ. No. 214 (D. Mont., 1963). Senate Report 700 (84th Cong., 1st Ses.) specifically stated that "the Yellowtail Dam and Reservoir will occupy Crow Indian lands and the Secretary should proceed, under whatever statutory authority may be available to him, immediately to secure the rights-of-way necessary for the dam, reservoir, appurtenances, and associated works." See also note 3, *supra*.

The Tribes' reliance on treaty minutes[5] fail to mention that in those minutes, there were two references to Flathead Lake, neither of which even intimated the Lake would be owned by the Tribes:

> "Governor Stevens. It provides for a reservation from the Jocko River *to the Flathead Lake,* and from the *Flathead River* to the mountains.
>
> • • •
>
> Alexander, Chief of the Flatheads. I think both sides of the Flathead River will be just enough.
>
> Gov. S. Are you through?
>
> Alexander. I will take from the Course de Femme on both sides of the river *to the lake.*" The Official Proceedings of the Council with the Flathead, Kootenai, and Upper Pend d'Oreille Indians Commencing July 7 and ending July 16, 1855 (National Archives Record Group No. 75, Treaty File No. 295, Item No. 1), pp. 35-36, 39. (Emphasis supplied.)

Although the Respondents attempt to create a public exigency (Tribes' Br., p. 12; U. S. Br., p. 12), it is patent that all tribal concerns would be nicely accommodated without violating the Equal Footing Doctrine. Thus, tribal fishing rights would survive without ownership (*United States v. Winnans,* 198 U. S. 371 (1905)); the Tribes would possess access to Flathead Lake without ownership (*Namen I,* 380 F. Supp. 452 (D. Mont., 1974), 534 F. 2d 1376 (9th Cir.) cert. den. 429 U. S. 929 (1976)); the Tribes would possess rights to lake water without ownership (*Winters v. United States,* 207 U. S. 564 (1908). Moreover, exclusive tribal fishing rights were clearly restricted to "streams" (Article III, App. F at 209), and surely, whatever rights they pos-

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[5]Tribes' brief at 11.

sessed in the lake fishery could be protected through equitable remedies. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658, modified 444 U. S. 816 (1979).

Moreover, neither Respondent is willing to even discuss one of the central themes running through *Montana v. United States*, which has particular significance to Flathead Lake. The navigational easement specifically thrust upon Flathead Lake by a treaty[6] negotiated contemporaneously with the Hellgate Treaty and approved by Congress in advance of the Hellgate Treaty clearly brings into focus this Court's discussion of that fact as bearing upon the ownership issue. 450 U. S. at 555. Thus, the treaty language and contemporaneous events in this case—those facts which this Court held are determinative of the ownership issue—are indistinguishable from those studied in *Montana v. United States.*

The fact that lower courts, in cases in which the sovereign interests of Montana were not even represented, starting in 1942, said half of Flathead Lake is owned by the Tribes hardly distinguishes the instant situation from that involving the Crow, where on three occasions, lower courts held ownership of the Big Horn River was concededly the Crow Tribe's. See note 3, *supra.* Can Montana's right to equality be compromised when it didn't even have an opportunity to challenge earlier decisions?

The development of Flathead River power sites is identical to the situation that existed on the Crow Indian Reservation. Although the Tribes obtain some revenue based upon their alleged ownership of Flathead Lake,

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[6]Article 8, Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (App. G at 221).

clearly, the bulk of that revenue is dependent upon the sites themselves.[7] Furthermore, the issue of whether the Tribes would still be entitled to an unreduced amount of revenue despite lack of lake ownership is not an issue in this case.

Although Respondents argue that this case is unique and that there are no far-reaching principles involved, in fact, that same argument will be advanced as other tribes seek to divest Montana and her sister states of their navigable waters.[8] In *Montana v. United States,* this Court definitely held that the mere creation of an Indian reservation is insufficient to evade the force and effect of the Equal Footing Doctrine. The lower court's decision graphically illustrates that this basic holding requires further reinforcement, because without that reinforcement, the holding of this Court will surely be diluted to an *ad hoc* decision.

THE REGULATORY ISSUE

Both Respondents argue that existing rights will not be disturbed if the lower court's decision on the regulatory

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[7]*Montana Power Co. v. Federal Power Commission,* 459 F. 2d 863, 871-872 (D. C. Cir., 1974), cert. den. 408 U. S. 30 (1972). See also *Montana Power Co. v. F. P. C.,* 298 U. S. 335, 337 (D. C. Cir., 1962).

[8]See Amici Brief at 1-2 and note 26, Petition for Certiorari. Indeed, Respondents made similar arguments prior to this Court's review in *Montana v. United States.* Tribes Br. in Opposition, p. 8; United States' Br. in Opposition, p. 9. Unless this Court puts the question to rest, every tribe with like interests will surely try to distinguish the Crow situation from their own, when in fact, treaty language is substantially identical to that construed in *Montana v. United States.* At least one lower court did not have that difficulty. *Wisconsin v. Baker,* No. 76-C-359 (W. D. Wis., Oct. 23, 1981), 8 I. L. R. 3152.

issue stands. That is just not so! The Tribes' ordinance clearly states that existing structures are not immune. Sections 3 (b) and 5, Ordinance 64-A, Shoreline Protection Ordinance, App. N, pp. 274-275, 278-280.

Fees for existing docks and wharves are set by the tribal government. *Id.*, Section 5(b)(4), App. N at 279-280. Challenges to those fees are cognizable only in tribal forums, from which there is no appeal. Sections 8(c) and 10, App. N at 282-283. Confiscatory fees, fines, and penalties are clearly another method by which non-Indian rights can be confiscated. Token representation on the board is hardly a substitute for meaningful participation in tribal government or the right to full "Bill of Rights" protection. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 135, 153, 154 (1980).[9] This is not a case in which a non-Indian willingly succumbs to tribal jurisdiction by contract or entering into consensual relations. *Montana v. United States, supra*, 450 U. S. at 565. Here, a non-member is only attempting to exercise a property right granted to him by Congress free from tribal control.

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[9]The Tribes' inclusion of Corps of Engineers regulations (Tribes' App. 4a, *et seq.*) promulgated after the lower court's decision, which make reference to the Tribes' Shoreline Protection Ordinance, points up three reasons why tribal regulation should not be approved. First, the United States Corps of Engineers has obviously adopted comprehensive regulations. Second, the Corps' activities do fall within "Bill of Rights" protections. Third, the north half of the lake is subject to state and Corps regulation, while the south half would be subject to tribal and Corps regulation—a result which obviously could result in disparity of treatment.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of September, 1982.

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No. 82-22

In The

Supreme Court of the United States

October Term 1982

JAMES M. NAMEN, et al. and STATE OF MONTANA,

Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al. and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, IOWA, MINNESOTA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, WEST VIRGINIA, AND WISCONSIN, IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Does the language of the 1855 Treaty of Hell Gate rebut the "strong presumption" against conveyance of the bed and banks of navigable waterways to Indian tribes, as recognized by this Court in *Montana v. United States*, 450 U. S. 544 (1981)?

II.

May an Indian tribe regulate the exercise of riparian rights owned by non-Indian reservation land owners where the exercise of those rights has not been shown to threaten "the political integrity, the economic security, or the health or welfare of the tribe?"

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are states which have Indian reservations within their boundaries. Many of these reservations contain or abut navigable bodies of water, the lands riparian to which are owned, at least in part, by non-Indians.[1] This

[1]In Idaho, for example two of the four Indian reservations contain large amounts of land owned by non-Indians. On the Nez Perce Reservation, 669,000 of the 756,000 acres, or 88.5%, is owned by non-members of the tribe. One of the state's

(Continued on following page)

Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), clarified the rights of these riparian owners vis-a-vis the reservation tribes by holding, first, that absent a clearly expressed contrary intention supported by exigent circumstances, the setting aside by Congress of certain lands for an Indian reservation does not convey to the Indians title to the bed and banks of navigable waterways contained within the granted territory, and, second, that the tribes' sovereign powers do not allow civil regulation of non-Indians "beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S. at 564. The decision of the Ninth Circuit Court of Appeals in this case, reported as *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), either misapplies the rules announced by this Court in *Montana*, or construes this Court's decision so narrowly as to render it inapplicable beyond its own facts.

While not all of the states who join this brief are directly interested in the law governing ownership of navigable waterways within Indian reservations,[2] all of the

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(Continued from previous page)

major fisheries, the Clearwater River, flows through the Nez Perce Reservation. On the Coeur d'Alene Reservation, approximately 80% of the 345,000 acres is owned by non-members of the tribe. The boundaries of the Coeur d'Alene Reservation contain several navigable bodies of water including the St. Joe River and Lake Coeur d'Alene. In addition, the Snake and Blackfoot Rivers form portions of the boundary of the Fort Hall Reservation.

Similarly, in Washington, much of the land on the state's 23 reservations has passed into non-Indian ownership. *See, e.g., Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977). The non-Indian population of Washington's reservations is approximately 58,000, while the Indian population of the reservations is approximately 13,500. Most of these reservations contain navigable waters within their boundaries.

[2]The States of Utah and New Mexico have no Indian reservations which contain or abut navigable waterways. They share

(Continued on following page)

amici states are vitally interested in assuring that the rules announced by this Court to govern relations between tribal governments and non-members are consistently and conscientiously applied by lower courts. The amici states include states within the Ninth Circuit whose rights are directly controlled by the decision in this case. In addition, litigation involving those amici states from other circuits will undoubtedly be influenced by this decision. The Ninth Circuit's ruling invites the Indian tribes in the amici states to assert ownership rights and regulatory powers which are foreclosed under any proper reading of the *Montana* case. If the principles announced in *Montana* are to be applied properly and uniformly this Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

The case and facts are fully set forth in the petition for certiorari.

SUMMARY OF ARGUMENT

The Court should grant certiorari and reverse the decision of the Court of Appeals because that decision misapprehends the proper application of the decision in *Montana*.[3] First, *Montana* holds that Congress' intent to

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(Continued from previous page)

the interest of the other amici that the Court of Appeals has misapplied this Court's decisions regarding tribal regulatory authority over non-members.

[3]This Court has cited a Court of Appeals' misapplication of controlling precedent as a ground for granting certiorari. *See, e. g., Schlude v. Comm'r*, 372 U. S. 128, 130 (1963); *Wilkinson v. United States*, 365 U. S. 399, 401 (1961); *see also Ramah Navajo School Board v. Bureau of Revenue*, 50 U. S. L. W. 5101, 5105 (1982).

convey the bed and banks of navigable waterways when an Indian reservation is created may not be inferred from the mere inclusion of the waterway within reservation boundaries. The Court of Appeals drew precisely this prohibited inference in the present case. Moreover, the Court of Appeals, in deciding that the tribes had the power to regulate the exercise of riparian rights by non-members, ignored the record in this case and applied a legal standard inconsistent with this Court's decision in *Montana*. These holdings will have widespread adverse impacts in the amici states unless this Court intervenes by requiring the Court of Appeals to follow the law expressed in *Montana*.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Appeals that the Treaty of Hell Gate conveyed the bed and banks of Flathead Lake to the tribes is inconsistent with this Court's holding in Montana v. United States.

The question presented in this case is identical to the one considered by this Court in *Montana*—whether treaty language which establishes a reservation conveys to the Indians title to the bed and banks of a navigable waterway located within the reservation boundaries. In *Montana*, this Court stated the governing principles as follows:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sover-

> eign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

450 U. S. at 552 (citations omitted). The Court explicitly stated that the mere fact that a body of water is included within the boundaries of a reservation does not overcome the presumption against conveyance absent some explicit reference to the bed of the waterway. *Id.* at 554.

In the present case, the Court of Appeals distinguished *Montana* on three grounds. First, the court noted the existence of precedent in the Ninth Circuit holding that the Hell Gate treaty conveyed title to the lakebed, and stated that precedent on questions of title to real estate was entitled to special deference. 665 F. 2d at 960-61. Second, the court noted that the Treaty of Hell Gate explicitly refers to Flathead Lake, while the treaty at issue in *Montana* made no reference to the Bighorn River. 665 F. 2d at 961-62. Finally, the court noted that unlike the Crow Tribe in *Montana*, the Confederated Salish and Kootenai Tribes relied on fishing for sustenance, providing a "public exigency" to support conveyance of the lakebed which was absent in *Montana*. 665 F. 2d at 962. On close analysis, none of these factors supports the decision of the Court of Appeals.

As to the effect of precedent, *Montana* clearly shows that the question of title depends on the intent of Congress as expressed by the language of the treaty evaluated in light of the circumstance at the time.[4] None of the three cases cited by the Court of Appeals here—*United States v. Pollmann*, 304 F. Supp. 995, 999 (D. Mont. 1973), *Montana Power Co. v. FPC*, 459 F. 2d 863, 865 (D. C. Cir.), *cert. denied*, 408 U. S. 930 (1972), and *Montana Power Co. v. Rochester*, 127 F. 2d 189, 191 (9th Cir. 1942)—contains an analysis of the factors declared by *Montana* to be relevant in evaluating the intent of Congress. The Court of Appeals nevertheless found the prior cases to be entitled to particular deference because of "the special reliance these decisions command" in establishing title to property. 665 F. 2d at 960. The Court of Appeals ignored the fact that the United States District Court for the District of Montana had held on at least three occasions that title to the bed and banks of the Bighorn River was held by the Crow Tribe. *Crow Tribe v. United States*, Civ. No. 214 (D. Mont. 1963); *United States v. 5677.94 Acres of Land*, 162 F. Supp. 108, 117 (D. Mont. 1958); *United States v. 5677.94 Acres of Land*, 152 F. Supp. 861, 863 (D. Mont. 1957); *see also United States v. Finch*, 548 F. 2d 822 (9th Cir.), *vacated on other grounds*, 433 U. S. 676 (1977). *Montana* does not discuss this precedent as having any particular relevance in determining the intent of Congress. The Court of Appeals therefore erred in giving particularly deferential consideration to *Rochester* and its Ninth Circuit

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[4]See *Oliphant v. Suquamish Tribe*, 435 U. S. 206, 208 n. 17 (1978).

progeny while ignoring the controlling precedent of *Montana*.

The reliance of the Court of Appeals on the express inclusion of the south half of Flathead Lake within the reservation boundaries is flatly inconsistent with the reasoning of this Court in *Montana*. The Court of Appeals inferred an intent to convey the lakebed from the mere fact of inclusion. The Court cited no language explicitly referring to the lakebed, as *Montana* requires, because no such language may be found in the treaty. Thus, the Court neatly reversed the presumption affirmed in *Montana*, by concluding that language which merely included the body of water within the reservation conveyed its bed and banks as well.

The Court of Appeals found a "public exigency" to support the conveyance of the lakebed in the fact that the tribes in question in this case were historically reliant on fishing.[5] Even if this is so, nothing in *Montana* suggests that the existence of a public exigency alone rebuts the presumption against conveyance. Here, the treaty protects the tribes' fishing rights, granting them the "exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, *in common with the citizens of the territory*." 12 Stat. 975, Art. III (July 16, 1855) (emphasis added). Nothing in this treaty suggests an intention to grant to the tribes the exclusive enjoyment of fishing rights on the south

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[5]The State of Montana contested this finding in the Court of Appeals, since most of the Confederated Tribes relied on hunting for sustenance. *See, e. g., Confederated Salish & Kootenai Tribes v. United States*, 8 Ind. Cl. 40, 43, 46, 47, 51, 52, 54.

half of Flathead Lake. *Cf. Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (manifest congressional intent to assist in establishment of tribal fishing industry found to support conveyance of bed of waterway). The fact that the treaty explicitly protects tribal fishing rights in this manner, without reference to the bed and banks of the lake, negates the inference drawn by the Court of Appeals.

The decision of the Court of Appeals in this case denied the petitioners the benefit of this Court's decision in *Montana*. If left intact, this holding will adversely affect the rights of the amici states and their citizens, and will encourage litigation, since under the analysis of the Court of Appeals, *Montana* is apparently to be limited to its facts. This Court should grant certiorari to prevent the widespread adverse impact which this decision will produce.

II.

The Court should grant certiorari to resolve the conflict perceived by the Court of Appeals between the decisions in Montana and Washington v. Confederated Tribes of The Colville Reservation.

In *Confederated Salish and Kootenai Tribes v. Namen*, 534 F. 2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976), the Court of Appeals for the Ninth Circuit recognized that non-Indian owners of lands abutting the south half of Flathead Lake owned riparian rights of access and wharfage. In the present case, the Court of Appeals ruled that the tribes nevertheless had the sovereign power

to regulate the exercise of these riparian rights. The Court perceived two standards which could be applied to determine the propriety of this regulation, one enunciated in *Montana* and the other pronounced earlier in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). In *Montana*, the question was whether the tribe could regulate the hunting and fishing activities of non-Indians conducted on lands within the reservation but not owned or controlled by the tribe.[6] The Court stated the general rule as follows: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. In *Colville*, the question involved the tribes' power to levy a tax on the sale of cigarettes on the reservation by the tribe to non-members. The Court sustained the tax, holding that tribal civil jurisdiction to tax such consensual commercial activities on tribal lands is divested only "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National government." 447 U.S. at 153. The Court of Appeals noted that *Montana* did not overrule or even discuss the *Colville* standard. However, the court found no federal interests infringed by tribal regulation and concluded that the *Colville* test was

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[6]The first part of the analysis of the Court of Appeals in this case rested on the premise that the exercise of riparian rights at issue here—construction of docks and wharves—actually involved non-Indian use of tribal trust land, since the docks and wharves in question intruded into the bed and banks of the lake which the Court had earlier found to belong to the tribe. This analysis falls for the reasons discussed in Part I, *supra*.

therefore satisfied. 665 F. 2d at 963-64. The Court also concluded that exercise of riparian rights by non-members could directly threaten or affect the political, economic, or social welfare of the tribe, and that under *Montana* tribal regulation of such conduct could be sustained. *Id.* at 964.

Amici submit that the court's analysis under the *Montana* standard is fatally flawed. This Court did state in *Montana* that a tribe may exercise civil jurisdiction over the conduct of non-Indians on non-Indian land within a reservation where the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S. at 566. However, the Court did not sustain the Crow tribe's regulation in *Montana* because the tribe made no factual showing that non-Indian hunting and fishing infringed on tribal subsistence or welfare. Here, unlike *Montana*, the tribes alleged in their complaint that the exercise of non-Indian riparian rights would detrimentally affect their fishing rights and the ecology of the lake. However, the counts containing these allegations were not proved and were dismissed by the district court with prejudice, a ruling which the tribes did not appeal. The tribes' failure to prove the detrimental impact alleged in the complaint establishes that for purposes of this case the adverse impacts inferred by the Court of Appeals do not exist. The tribes in this case stand on no better footing than did the Crow tribe in *Montana* in alleging detrimental impact on tribal subsistence or welfare.[7]

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[7] *Montana* clearly shows that exercise of regulatory jurisdiction over non-Indians on non-Indian land is the exception

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Since the holding of the Court of Appeals under the *Montana* standard is so obviously infirm, the Court is squarely presented with the question of whether the validity of the regulation in question here can be controlled by the decision in the *Colville* case. Amici submit that it may not. The conflict perceived by the Court of Appeals between the *Montana* and *Colville* case is illusory. Unlike *Montana, Colville* dealt with tribal civil jurisdiction to tax a non-member's commercial transaction with the tribe conducted on tribal land. The Court took great pains to distinguish taxation from the other forms of tribal regulation considered by the Court in *United States v. Wheeler*, 434 U.S. 313 (1978), and in *Oliphant v. Suquamish Tribes*, 434 U.S. 791 (1978), the case discussed at greatest length by the Court in *Montana*. 447 U.S. at 153-54; *see Montana*, 450 U.S. at 565. In contrast, the tribes in this case seek to regulate the exercise by non-members of riparian rights which exist as a result of the non-members' ownership of land abutting the lake. *Montana* recognizes that such a regulation is impermissible since it "bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. This Court has not considered *Colville* as establishing a general rule on tribal jurisdiction over non-members for application

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rather than the rule, and that the party asserting the exception must prove the proper factual predicate. This is appropriate since tribal constitutions commonly exclude non-members from the tribal political process which seeks to regulate their conduct.

in cases not involving taxation of consensual commercial activities on tribal lands. *See, e.g., Merrion v. Jicarilla Apache Tribe,* 102 S. Ct. 894 (1982).[8] The Court should grant certiorari in this case to correct the Court of Appeals' mistaken view of the applicability of *Colville.*

CONCLUSION

One would have thought that the issues involved in this case would no longer be open to question given this Court's decision in *Montana.* However, the decision of the Court of Appeals in this case effectively circumvents the holdings in *Montana* by finding, first, that the mere inclusion of the south half of Flathead Lake within the boundaries of the Flathead Reservation worked a conveyance of the bed and banks of the lake to the tribes, and, second, that in any event the tribes could regulate the exercise of riparian rights on non-Indian land by non-Indians. These holdings raise substantial questions of

[8]The view that *Colville* applies in this context only to tribal taxes imposed on activities conducted on Indian lands is buttressed by the fact that less than one year after deciding *Montana,* this Court decided *Merrion,* a case involving a tribal tax on minerals severed from tribal land by non-Indians pursuant to a lease with the tribe. *Merrion* cites *Colville* as establishing the rule that the power to tax "transactions occurring on trust lands and significantly involving the tribe and its members" is a fundamental attribute of tribal sovereignty. 102 S. Ct. at 901. The Court did not cite *Montana, Oliphant,* or *Wheeler. But see* 102 S. Ct. at 918-19 (Stevens, J., dissenting). Moreover, in *Montana,* the Court cited *Colville* only for the limited proposition that a tribe retains the power to tax non-Indians' consensual on-reservation commercial contacts with the tribe. 450 U. S. at 566.

importance to the amici states and their citizens, as to the effect of the *Montana* decision and its relationship with the prior decision in *Colville*. This Court should grant the petition for certiorari to resolve these problems.

Respectfully submitted this 27 day of July 1982.

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